

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

UNITED STATES OF AMERICA, )  
 ) CR-18-00258-EJD  
 PLAINTIFF, )  
 ) SAN JOSE, CALIFORNIA  
 VS. )  
 ) JUNE 8, 2022  
 RAMESH "SUNNY" BALWANI, )  
 ) VOLUME 35  
 DEFENDANT. )  
 ) PAGES 6573 - 6668

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TRANSCRIPT OF TRIAL PROCEEDINGS  
BEFORE THE HONORABLE EDWARD J. DAVILA  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE  
BY: JOHN C. BOSTIC  
JEFFREY B. SCHENK  
150 ALMADEN BOULEVARD, SUITE 900  
SAN JOSE, CALIFORNIA 95113  
  
BY: ROBERT S. LEACH  
KELLY VOLKAR  
1301 CLAY STREET, SUITE 340S  
OAKLAND, CALIFORNIA 94612

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

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PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY  
TRANSCRIPT PRODUCED WITH COMPUTER

A P P E A R A N C E S: (CONT'D)

FOR DEFENDANT BALWANI: ORRICK, HERRINGTON & SUTCLIFFE LLP  
BY: MOLLY MCCAFFERTY

SHAWN ESTRADA  
SACHI SCHURICHT

THE ORRICK BUILDING  
405 HOWARD STREET  
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BY: JEFFREY COOPERSMITH  
AARON BRECHER  
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701 FIFTH AVENUE, SUITE 5600  
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BY: STEPHEN CAZARES  
77 SOUTH FIGUEROA STREET, SUITE 3200  
LOS ANGELES, CALIFORNIA 90017

BY: AMY WALSH  
51 W 52ND STREET  
NEW YORK, NEW YORK 10019

ALSO PRESENT:

OFFICE OF THE U.S. ATTORNEY  
BY: MADDI WACHS, PARALEGAL  
SARA SLATTERY, PARALEGAL

UNITED STATES POSTAL INSPECTION SERVICE  
BY: CHRISTOPHER MCCOLLOM

FEDERAL BUREAU OF INVESTIGATION  
BY: MARIO C. SCUSSEL

UNITED STATES FOOD & DRUG  
ADMINISTRATION  
BY: GEORGE SCAVDIS

1 SAN JOSE, CALIFORNIA

JUNE 8, 2022

2 P R O C E E D I N G S

10:10AM 3 (COURT CONVENED AT 10:10 A.M.)

10:10AM 4 (JURY OUT AT 10:10 A.M.)

10:10AM 5 THE COURT: WE ARE ON THE RECORD IN THE BALWANI  
10:10AM 6 MATTER.

10:10AM 7 WHY DON'T I HAVE COUNSEL STATE THEIR APPEARANCES, PLEASE.

10:10AM 8 MS. VOLKAR: GOOD MORNING, YOUR HONOR.

10:10AM 9 KELLY VOLKAR ON BEHALF OF THE UNITED STATES.

10:10AM 10 I'M JOINED BY MY COLLEAGUES, ROBERT LEACH, JOHN BOSTIC,  
10:10AM 11 JEFF SCHENK, OUR CASE AGENT, CHRISTOPHER MCCOLLOWS, AND OUR  
10:10AM 12 WONDERFUL PARALEGALS, MADDI WACHS AND SARA SLATTERY.

10:10AM 13 THE COURT: THANK YOU. GOOD MORNING.

10:11AM 14 MR. COOPERSMITH: GOOD MORNING.

10:11AM 15 JEFF COOPERSMITH FOR MR. BALWANI, WHO IS PRESENT, AND I'M  
10:11AM 16 JOINED BY MY COLLEAGUES AMY WALSH, STEPHEN CAZARES,  
10:11AM 17 AARON BRECHER, AND SACHI SCHURICHT.

10:11AM 18 THE COURT: THANK YOU. GOOD MORNING.

10:11AM 19 WE SET TODAY FOR OUR INITIAL CHARGING CONFERENCE TO  
10:11AM 20 DISCUSS JURY INSTRUCTIONS THAT THE COURT MIGHT GIVE IN THIS  
10:11AM 21 CASE.

10:11AM 22 I DID RECEIVE YESTERDAY SUBMISSIONS FROM THE GOVERNMENT  
10:11AM 23 REGARDING PROPOSED JURY INSTRUCTIONS.

10:11AM 24 I ALSO RECEIVED SUBMISSIONS FROM THE DEFENDANT ON PROPOSED  
10:11AM 25 JURY INSTRUCTIONS, SUPPLEMENTAL INSTRUCTIONS, AS WELL AS A

1 REFERENCE TO DOCUMENT 1210, EXCUSE ME, DOCUMENT 1210 FROM THE  
2 DEFENDANT.

3 I ALSO HAVE WITH ME, AS I'M SURE YOU DO, DOCUMENT 1206,  
4 WHICH ARE THE INSTRUCTIONS, THE FINAL INSTRUCTIONS THAT WERE  
5 GIVEN IN THE COMPANION CASE.

6 AND I DO HAVE THE MODEL NINTH CIRCUIT INSTRUCTIONS WITH  
7 ME, AND YOU SHOULD TOO IN SOME FORM.

8 ANYTHING ELSE THAT YOU THINK I SHOULD HAVE THIS MORNING  
9 THAT I HAVEN'T MENTIONED?

10 MS. VOLKAR: NO, YOUR HONOR.

11 BUT I DO HAVE SOME PRELIMINARY REMARKS WHENEVER THE COURT  
12 IS READY.

13 THE COURT: SURE.

14 LET ME ASK, ANYTHING ELSE?

15 MR. COOPERSMITH: NO, YOUR HONOR.

16 BUT MY COLLEAGUE, MS. WALSH AND MS. SCHURICHT WILL HANDLE  
17 THE PROCEEDINGS THIS MORNING. SO THANK YOU.

18 THE COURT: SURE. THANK YOU.

19 GOOD MORNING.

20 MS. WALSH: GOOD MORNING, YOUR HONOR.

21 THE COURT: MS. VOLKAR.

22 MS. VOLKAR: THANK YOU, YOUR HONOR.

23 SO THE GOVERNMENT RECEIVED THE DEFENDANT'S FILINGS LAST  
24 NIGHT. THE GOVERNMENT FILING THAT YOUR HONOR REFERENCED WAS  
25 1211, THE GOVERNMENT'S PROPOSED JURY INSTRUCTIONS FILED BASED

1 ON THE PRETRIAL DEADLINE. THEY ARE BASED LARGELY ON THE MODEL  
2 INSTRUCTIONS, AND WE'LL GET TO THAT IN A MOMENT.

3 BUT I DON'T NEED TO REMIND THE COURT, I'M SURE YOU'RE WELL  
4 AWARE, THE JURY INSTRUCTIONS WERE WELL LITIGATED IN THE PRIOR  
5 TRIAL. THE HOLMES TEAM FILED A 120-PAGE INITIAL PROPOSED JURY  
6 INSTRUCTIONS. WE HAD A CHARGING CONFERENCE OVER THE COURSE OF  
7 THREE DAYS. THERE WAS QUITE A BIT OF VIGOROUS DEBATE ABOUT  
8 SEVERAL OF THE INSTRUCTIONS.

9 THERE WAS SORT OF NIT-PICKING OF THE VARIOUS WORDS IN THE  
10 MODEL INSTRUCTIONS FOR THINGS AS SIMPLE AS CHANGING "DEFENDANT"  
11 TO "MS. HOLMES" AND ADDING "ALLEGED" FOR CONSPIRACY TO  
12 SUBSTANTIVE COUNTS, TO MUCH MORE SUBSTANTIVE CHANGES. AND  
13 THERE IS PLENTY OF CASE LAW AND LEGAL CITATIONS.

14 I SAY ALL OF THIS TO SAY THERE WAS QUITE A BIT OF WORK  
15 DONE THERE, AND BASED ON THE DEFENDANT'S FILING LAST NIGHT, I  
16 CONFERRED BRIEFLY WITH MS. WALSH BEFORE OUR HEARING THIS  
17 MORNING, AND IT SEEMS THAT, I DON'T WANT TO SPEAK FOR HER, THAT  
18 THE PARTIES LARGELY AGREE THAT WE WOULD LIKE TO CAPTURE SOME OF  
19 THE WORK THAT WAS DONE IN THE LAST TRIAL.

20 SO THE GOVERNMENT THOUGHT WE WOULD BE STARTING WITH A  
21 CLEAN SLATE AND WE'RE PREPARED TO DO THAT IF NEED BE, BUT WE'RE  
22 ALSO HAPPY TO ACKNOWLEDGE THAT THERE WAS A LOT OF WORK THAT WAS  
23 DONE BEFORE.

24 AND WITH THAT, IF THAT IS OUR BASELINE AND THE DEFENDANT  
25 HAS INCORPORATED AND ADOPTED THE HOLMES OBJECTIONS AND

10:14AM 1 REQUESTS, ET CETERA, THE GOVERNMENT ON THE RECORD WOULD LIKE TO  
10:14AM 2 INCORPORATE ITS OBJECTIONS AND REQUESTS AND ARGUMENTS THAT WERE  
10:14AM 3 MADE AT THE CHARGING CONFERENCE IN THE HOLMES MATTER, AS WELL  
10:14AM 4 AS ANY FILINGS.

10:14AM 5 OF COURSE THERE WAS ALSO QUITE A BIT OF MEET AND CONFER  
10:14AM 6 BETWEEN THE PARTIES, MEANING THE GOVERNMENT AND THE HOLMES  
10:14AM 7 DEFENSE TEAM, THAT WAS OFF THE RECORD, AND SAME THING, WE  
10:14AM 8 MAINTAIN ALL OF OUR POSITIONS.

10:14AM 9 THE GOVERNMENT PARTICULARLY WANTS TO NOTE THE COURT WILL  
10:15AM 10 LIKELY REMEMBER THAT WE HAD A PARTICULARLY VIGOROUS DEBATE OVER  
10:15AM 11 THE MENS REA AND THE GIVING OF THE INSTRUCTION OF "WILLFULLY."

10:15AM 12 THE GOVERNMENT CONTINUES TO OBJECT TO THAT INSTRUCTION, IT  
10:15AM 13 WON'T SURPRISE THE TO HEAR, AS A HEIGHTENED MENS REA.

10:15AM 14 BUT WE ALSO UNDERSTAND IT WAS GIVEN IN THE HOLMES CASE,  
10:15AM 15 AND IT WILL LIKELY BE GIVEN HERE.

10:15AM 16 SO THE LAST THING I WANT TO SAY ON THAT POINT IS THAT IF  
10:15AM 17 WE ARE NOT RELITIGATING WHAT WAS SORT OF VIGOROUSLY DEBATED AND  
10:15AM 18 THE CONCLUSIONS REACHED IN THE HOLMES CASE, THEN THERE WAS A  
10:15AM 19 SIGNIFICANT AMOUNT OF CHANGES THAT WERE ALREADY MADE TO THE  
10:15AM 20 MODEL INSTRUCTIONS. THERE WAS A SIGNIFICANT AMOUNT OF DEBATE  
10:15AM 21 OVER VARIOUS WORDS AND LINES THAT WERE ULTIMATELY ADDED.

10:15AM 22 AND I DON'T WANT THAT TO BE FORGOTTEN IN OUR DISCUSSION  
10:15AM 23 TODAY WHEN, IN SOME INSTANCES, I WILL POINT TO VERY SIMILAR  
10:15AM 24 REQUESTS BY THIS DEFENDANT THAT WERE VIGOROUSLY DEBATED AND  
10:15AM 25 LOST.

1 AND WHAT I MEAN TO SAY THERE IS, OF COURSE, THE GOVERNMENT  
2 TAKES ITS LOSSES, FOR EXAMPLE, ON THE WILLFULLY, SPECIFIC  
3 UNANIMITY, ET CETERA; BUT THEN THE DEFENDANT WILL ALSO HAVE TO  
4 TAKE THE LOSSES, SO TO SPEAK, OF THE HOLMES TEAM IN THE COURT  
5 REACHING THE RIGHT CONCLUSION AND THE RIGHT RESULT THAT IT DID  
6 LAST GO-ROUND.

7 A CLEAR EXAMPLE, OR JUST ONE SORT OF SEPARATE EXAMPLE, IS  
8 THE VERDICT FORM. I DON'T KNOW IF YOUR HONOR HAS HAD A CHANCE  
9 TO REVIEW IT.

10 BUT THE DEFENDANT HAS SUBMITTED THE EXACT SAME VERDICT  
11 FORM THAT THE HOLMES TEAM SUBMITTED, A LONGER LINE, NOT GUILTY  
12 BEFORE GUILTY.

13 THIS IS JUST ONE EXAMPLE THAT I WANT TO POINT TO AT THE  
14 OUTSET OF AN ATTEMPT TO RELITIGATE, BUT TO MAINTAIN, ALL OF THE  
15 FAVORABLE TO THE DEFENDANT WORK THAT WAS DONE IN THE HOLMES  
16 CASE.

17 SO THERE ARE GOING TO BE SOME TIMES TODAY WHERE I WILL  
18 SAY, "YOUR HONOR, WE DID ARGUE THIS BEFORE."

19 IT'S NOT THAT THE GOAL POST HAS SORT OF MOVED TO THE  
20 MIDDLE ALREADY AND WE SHOULD MOVE FATHER. IN SOME INSTANCES WE  
21 SHOULD -- IF THE COURT REACHED THE RIGHT RESULT LAST TIME, WE  
22 SHOULD STICK WITH IT.

23 WITH THAT LONG PREAMBLE, I THINK IT MAKES SENSE TO WALK  
24 THROUGH THE DEFENDANT'S FILING FROM LAST NIGHT, 1476.

25 I ALSO MENTIONED TO MS. WALSH THAT I WOULD ADVOCATE FOR

10:17AM 1 THAT TO THE COURT. THAT'S WHAT I'M PREPARED TO DO.

10:17AM 2 BUT I'M ALSO HAPPY TO TAKE THE COURT'S DIRECTION IF  
10:17AM 3 THERE'S AN EASIER, SMOOTHER WAY TO GO ABOUT IT.

10:17AM 4 AND ON THAT NOTE, I JUST HAD A MOMENT TO SAY TO MS. WALSH,  
10:17AM 5 THE GOVERNMENT IS NOT INTENDING TO SORT OF OBJECT FURTHER  
10:17AM 6 BEYOND ITS MAINTAINING ITS PRIOR OBJECTIONS TO INSTRUCTION  
10:17AM 7 NUMBER 6, NUMBER 12, NUMBER 15, NUMBER 19, NUMBER 24,  
10:18AM 8 NUMBER 25, AND NUMBER 27, AND THOSE ARE -- THEY ARE THE NUMBERS  
10:18AM 9 OF THE INSTRUCTIONS GIVEN IN THE HOLMES CASE, BUT THEY MATCH  
10:18AM 10 WHAT ARE THE NUMBERED INSTRUCTIONS IN ECF 1476.

10:18AM 11 I WILL REFERENCE THEM AGAIN AS WE GO THROUGH, BUT I  
10:18AM 12 THOUGHT IT WOULD HELP BOTH THE DEFENSE COUNSEL AND THE COURT TO  
10:18AM 13 HAVE THOSE AT THE OUTSET.

10:18AM 14 THANK YOU.

10:18AM 15 THE COURT: THANK YOU VERY MUCH.

10:18AM 16 AND I DO NOTE, MS. WALSH, BEFORE I ASK YOU TO SPEAK TO  
10:18AM 17 THIS, THAT YOUR SUBMISSION SEEMED TO SAY THE SAME THINGS THAT  
10:18AM 18 MS. VOLKAR JUST INDICATED AS TO RESERVING OBJECTIONS AND  
10:18AM 19 ADOPTING THE OBJECTIONS, THE COMMENTS OF MS. HOLMES'S ATTORNEYS  
10:18AM 20 IN THAT DISCUSSION AND PRESERVING THOSE ARGUMENTS AS YOUR OWN.  
10:18AM 21 I THINK YOU SAID THAT IN YOUR PLEADINGS.

10:18AM 22 MS. WALSH: WE DID, YOUR HONOR, YES.

10:19AM 23 THE COURT: RIGHT. AND SO I RECOGNIZE THAT.

10:19AM 24 IT SEEMS THAT YOU'RE BOTH IN ACCORD ON THAT. YOU WANT TO  
10:19AM 25 RECOGNIZE THOSE OBJECTIONS. THERE WERE FULSOME OBJECTIONS.



1 OF COURSE I'M NOT GOING TO PRECLUDE EITHER PARTY FROM  
2 SAYING ANYTHING FURTHER THAT YOU THINK WOULD BE HELPFUL IN  
3 REGARDS TO THE FINALITY OF THOSE INSTRUCTIONS.

4 I THINK YOU WOULD AGREE -- YOU MAY HAVE BEEN IN THE  
5 COURTROOM WHEN WE HAD THOSE DISCUSSIONS. THERE WAS A LOT OF  
6 WORK. IT WAS MORE THAN ONE DAY, TWO DAYS, AND WE REACHED A  
7 WORK PRODUCT THAT WAS, I THINK, 39 PAGES, SOMETHING LIKE THAT,  
8 THAT WERE THE FINAL INSTRUCTIONS.

9 I'M HAPPY TO TRY TO MAINTAIN SOME ECONOMIES OF SCALE FOR  
10 THAT, BUT I DON'T WANT TO PRECLUDE EITHER SIDE FROM A FULSOME  
11 OPPORTUNITY TO EXPRESS THEIR THOUGHTS AND VIEWS ON WHAT THE  
12 FINAL INSTRUCTIONS SHOULD BE IN THIS CASE.

13 BUT I'M GUIDED BY YOUR SUBMISSIONS, AND THAT'S HELPFUL. I  
14 THINK THAT WOULD HELP OUR CONVERSATION.

15 AS I LOOKED AT THESE, BOTH YOUR SUBMISSIONS OVER THE  
16 EVENING AND THIS MORNING AGAIN, PERHAPS I'M PROJECTING TOO  
17 MUCH, BUT IT SEEMS TO ME THAT THERE WILL PROBABLY BE SOME  
18 VIGOROUS DISCUSSION ON MAYBE A HANDFUL OF INSTRUCTIONS, AND  
19 THAT'S REALLY ABOUT IT. THAT'S MY SENSE OF IT.

20 BUT WE'LL SEE.

21 MS. WALSH.

22 MS. WALSH: YES, YOUR HONOR. AND THANK YOU FOR  
23 THAT.

24 WHAT MS. VOLKAR ARTICULATED I AGREED WITH AND IS EXACTLY  
25 THE REASON THAT WE FILED 1476 IN THE WAY THAT WE DID. WE --

10:20AM 1 AND IT'S THE SIMILAR APPROACH THAT WE TOOK WITH REGARD TO THE  
10:20AM 2 MOTIONS IN LIMINE THAT WE JOINED FROM THE HOLMES CASE THAT HAD  
10:20AM 3 BEEN FULLY ARGUED AND WERE DECIDED BY THE COURT, BUT WE DIDN'T  
10:20AM 4 HAVE ANYTHING FURTHER TO ADD.

10:20AM 5 LIKEWISE, THE JURY INSTRUCTIONS WERE FULLY LITIGATED. WE  
10:21AM 6 CERTAINLY WANT TO PRESERVE AND INTEND TO PRESERVE ALL OF OUR  
10:21AM 7 OBJECTIONS IN JOINING MS. HOLMES'S ARGUMENTS.

10:21AM 8 BUT THE COURT DECIDED ON A FINAL SET OF JURY INSTRUCTIONS  
10:21AM 9 IN THE HOLMES TRIAL. I THINK FOR EFFICIENCY'S SAKE, IT MAKES  
10:21AM 10 SENSE TO START FROM THAT POINT, AND SO THAT WAS THE BASIS FOR  
10:21AM 11 OUR FILING OF 1476.

10:21AM 12 THE COURT: OKAY. THANK YOU.

10:21AM 13 AND I BELIEVE -- I JUST WANT TO MAKE CERTAIN THAT I HAVE  
10:21AM 14 COPIES. WHAT I HAVE A COPY OF IN MY BINDER AND WHAT I'VE  
10:21AM 15 PREPARED DOES NOT HAVE A DOCKET NUMBER ON IT.

10:21AM 16 BUT IS 1476 -- DOES THAT -- IS THAT TITLED MR. BALWANI'S  
10:21AM 17 SUPPLEMENTAL PROPOSALS RE JURY INSTRUCTIONS AND VERDICT FORM?

10:21AM 18 MS. WALSH: IT IS, YOUR HONOR, OR IT DOES. AND I  
10:21AM 19 THINK YOU MAY HAVE THE WORD VERSION THAT DOESN'T HAVE THE  
10:21AM 20 DOCKET STAMP.

10:21AM 21 THE COURT: RIGHT.

10:22AM 22 MS. WALSH: SO I'M GOING TO HAND UP THE DOCKET  
10:22AM 23 STAMPED VERSION IF THAT HELPS THE COURT.

10:22AM 24 IT'S ALSO COLOR COPIED, SO IT MIGHT BE USEFUL.

10:22AM 25 THE COURT: OKAY. IT'S ONE MORE THING TO HAVE ME

10:22AM 1 GET CONFUSED UP HERE.

10:22AM 2 MS. WALSH: I HAVE A COLOR COPY.

10:22AM 3 MS. VOLKAR: I HAVE IT.

10:22AM 4 THE COURT: ALL RIGHT. I THINK THIS IS THE SAME  
10:22AM 5 THING I HAVE IN MY BINDER. THANK YOU.

10:22AM 6 MS. VOLKAR: FOR CLARITY, YOUR HONOR, WOULD IT BE  
10:22AM 7 HELPFUL TO REFER TO THE ECF STAMP AT THE TOP, WHICH IS WHAT I  
10:22AM 8 WAS INTENDING TO DO. BUT I COULD EASILY SWITCH TO THE NUMBER  
10:22AM 9 IN THE MIDDLE OF THE BOTTOM PAGE IF THAT'S MORE --

10:22AM 10 THE COURT: I EXPECT THAT WE'RE GOING TO REFERENCE  
10:22AM 11 BOTH, WON'T WE? I THINK THAT'S -- NOW THAT WE HAVE ALL OF THIS  
10:22AM 12 AT HAND. THANK YOU.

10:22AM 13 ANYTHING FURTHER, MS. WALSH?

10:22AM 14 MS. WALSH: NO, YOUR HONOR.

10:22AM 15 THE COURT: HERE'S WHAT I THOUGHT WE WOULD DO, IS IT  
10:22AM 16 SEEMS TO ME TO MAKE SENSE TO START AND GO THROUGH EACH  
10:22AM 17 INSTRUCTION THAT THE COURT INTENDS TO GIVE, AND WE'LL START  
10:22AM 18 WITH 3.1, WHICH IS THE INTRODUCTORY INSTRUCTION.

10:23AM 19 AND I HAVE YOUR PAGE -- 1476, ECF 2, AND IT HAS THAT CHART  
10:23AM 20 THAT WAS NICELY PREPARED.

10:23AM 21 AND I HAVE THE GOVERNMENT'S FILING ALSO THAT I'M  
10:23AM 22 REFERENCING.

10:23AM 23 3.1, "DUTIES OF JURY TO FIND FACTS AND FOLLOW THE LAW."

10:23AM 24 WHEN I SAY 3.1 AND WHEN I GIVE THOSE INSTRUCTIONS, I'M  
10:23AM 25 TALKING ABOUT THE MODEL INSTRUCTIONS, THE NINTH CIRCUIT MODEL

10:23AM 1 INSTRUCTIONS JUST FOR THE RECORD.

10:23AM 2 I'LL JUST GO THROUGH THESE.

10:23AM 3 THE COURT WILL GIVE 3.1.

10:23AM 4 3.2 IS "PRESUMPTION OF INNOCENCE."

10:23AM 5 AND I BELIEVE --

10:24AM 6 MS. VOLKAR: YOUR HONOR, IF I MAY?

10:24AM 7 THE COURT: YES.

10:24AM 8 MS. VOLKAR: NOT TO DERAIL US SO EARLY, BUT IN 3.1,

10:24AM 9 THAT WOULD BE ONE OF THE FIRST EXAMPLES WHERE, IN THE HOLMES

10:24AM 10 INSTRUCTIONS, THERE WERE ADDITIONAL WORDS ADDED.

10:24AM 11 IN THE VERSION -- I'VE CONFIRMED WITH THE COURTROOM DEPUTY

10:24AM 12 THIS MORNING. IN THE VERSION I SUBMITTED, IT JUST TRACKS THE

10:24AM 13 MODEL LANGUAGE.

10:24AM 14 BUT I HAVE DONE THE WORK OF IDENTIFYING WHAT SHOULD BE

10:24AM 15 ADDED IF THE COURT WANTED TO GIVE THE SAME INSTRUCTION IN THE

10:24AM 16 HOLMES CASE. IT'S SOMEWHAT EASY IN THAT 3.1 ADDED TO --

10:24AM 17 THE COURT: IN DOCKET 1206?

10:24AM 18 MS. VOLKAR: CORRECT, IN DOCKET 1206, LINES 10

10:24AM 19 THROUGH 12, THERE WERE ADDITIONAL CATEGORIES ADDED,

10:24AM 20 SPECIFICALLY AFTER GENDER, THE COURT ADDED "PROFESSION,

10:24AM 21 CELEBRITY," ECONOMIC CIRCUMSTANCES IS IN THE MODEL, BUT ALSO

10:25AM 22 "OR POSITION IN LIFE OR IN THE COMMUNITY."

10:25AM 23 AND I ONLY -- I DON'T WANT TO DERAIL US THROUGHOUT THE

10:25AM 24 MORNING, BUT I ONLY SAY THAT THE GOVERNMENT IS HAPPY TO ADD

10:25AM 25 THAT LANGUAGE INTO A WORD DOCUMENT AND PREPARE IT FOR THE COURT

10:25AM 1 IF, AS THE PARTIES HAVE AGREED THIS MORNING, WE'RE SORT OF  
10:25AM 2 STARTING FROM WHAT WAS GIVEN IN THE HOLMES MATTER.

10:25AM 3 THE COURT: SURE. AND THANK YOU FOR THAT  
10:25AM 4 CORRECTION. IT WAS VERY TIMELY, BECAUSE IT'S THE FIRST  
10:25AM 5 INSTRUCTION.

10:25AM 6 AND WHEN I SAID I'LL GIVE 3.1, I WILL GIVE THE 3.1 THAT  
10:25AM 7 WAS GIVEN IN THE HOLMES CASE, AND LET'S REFERENCE IT THAT WAY.

10:25AM 8 SO ANY OBJECTION TO THAT?

10:25AM 9 MS. WALSH: NO, YOUR HONOR.

10:25AM 10 THE COURT: ALL RIGHT. SO THAT WILL BE GIVEN.  
10:25AM 11 NEXT IS 3.2, AND THAT IS "PRESUMPTION OF INNOCENCE."

10:26AM 12 3.2 IS THE DEFENSE ASKING THAT THE COURT CHANGE THE  
10:26AM 13 DEFENDANT TO MR. BALWANI?

10:26AM 14 MS. WALSH: YES, YOUR HONOR, THROUGHOUT IS OUR  
10:26AM 15 REQUEST, YES.

10:26AM 16 THE COURT: OKAY. SO THE COURT -- ANY COMMENT?

10:26AM 17 MS. VOLKAR: NO, YOUR HONOR. WE INCORPORATE OUR  
10:26AM 18 OBJECTIONS FROM LAST TIME, BUT WE'RE, AGAIN, HAPPY TO -- AND  
10:26AM 19 WE'RE ALSO HAPPY TO PROVIDE AN UPDATED WORD VERSION COPY THAT  
10:26AM 20 INCORPORATES THOSE CHANGES IF THAT WOULD BE HELPFUL.

10:26AM 21 THE COURT: THANK YOU. THANK YOU. IT WOULD BE  
10:26AM 22 HELPFUL. THANK YOU.

10:26AM 23 SO THE COURT WILL GIVE 3.2. IT WILL READ, "THE INDICTMENT  
10:27AM 24 IS NOT EVIDENCE. MR. BALWANI HAS PLEADED NOT GUILTY TO THE  
10:27AM 25 CHARGES. MR. BALWANI IS PRESUMED TO BE INNOCENT UNLESS AND

10:27AM 1 UNTIL THE GOVERNMENT PROVES HIS GUILT BEYOND A REASONABLE  
10:27AM 2 DOUBT."

10:27AM 3 "PROVES HIM GUILTY BEYOND A REASONABLE DOUBT." PARDON ME.

10:27AM 4 "IN ADDITION, MR. BALWANI DOES NOT HAVE TO TESTIFY OR  
10:27AM 5 PRESENT ANY EVIDENCE. MR. BALWANI DOES NOT HAVE TO PROVE  
10:27AM 6 INNOCENCE. THE GOVERNMENT HAS THE BURDEN OF PROVING EVERY  
10:27AM 7 ELEMENT OF THE CHARGES BEYOND A REASONABLE DOUBT."

10:27AM 8 THAT'S WHAT THE COURT INTENDS TO READ.

10:27AM 9 MS. WALSH?

10:27AM 10 MS. WALSH: NO OBJECTION, YOUR HONOR.

10:27AM 11 MS. VOLKAR: NO OBJECTION.

10:27AM 12 THE COURT: THANK YOU.

10:28AM 13 WHAT I NOTE NEXT IN THE HOLMES INSTRUCTION, 1206, IS THE  
10:28AM 14 ABSENCE OF CODEFENDANT.

10:28AM 15 I NOTE IN YOUR FILING 1476, YOU ASK -- YOU PRESENT AN  
10:28AM 16 ABSENCE OF CODEFENDANT THAT IS MODIFIED FROM THAT THAT WAS  
10:28AM 17 GIVEN IN THE HOLMES CASE, I BELIEVE.

10:28AM 18 ANYTHING FURTHER ON THIS FROM THE GOVERNMENT?

10:28AM 19 MS. VOLKAR: YES, YOUR HONOR.

10:28AM 20 SO THE COURT MAY WELL REMEMBER THIS IS NOT BASED ON THE  
10:28AM 21 MODEL INSTRUCTION. THIS WAS AN INSTRUCTION PROVIDED AND  
10:28AM 22 GENERATED OUT OF WHOLE CLOTH FROM THE DEFENSE HOLMES TEAM.

10:28AM 23 WE ARE -- WE FIND THE EDITS PROPOSED BY THE BALWANI TEAM A  
10:29AM 24 LITTLE BIT SURPRISING, NOT NECESSARILY AS FAR AS OBJECTIONABLE,  
10:29AM 25 BUT THE LANGUAGE ABOUT THE OUTCOME IN THE HOLMES CASE IS

10:29AM 1 NARROWER THAN THE CLOSEST MODEL INSTRUCTION WE COULD FIND,  
10:29AM 2 WHICH IS MODEL 2.16.

10:29AM 3 THE MODEL 2.16 IS CLEARLY INTENDED WHEN ONE DEFENDANT HAS  
10:29AM 4 TO UNDERGO A NEW TRIAL, AND SO IT'S REFERRING TO THE SAME  
10:29AM 5 DEFENDANT, BUT THE LANGUAGE WOULD BE APPLICABLE IF WE  
10:29AM 6 SUBSTITUTED IN MS. HOLMES'S NAME FOR ANOTHER TRIAL.

10:29AM 7 AND I'M HAPPY TO READ IT FOR THE COURT AND EVERYONE'S  
10:29AM 8 BENEFIT IF THAT WOULD BE HELPFUL.

10:29AM 9 THE COURT: IS THIS SOMETHING THAT YOU WOULD LIKE TO  
10:29AM 10 OFFER AS OPPOSED TO THE COURT GIVING THE INSTRUCTION THAT IT  
10:29AM 11 GAVE IN 1206, OF COURSE CHANGING THE NAMES?

10:30AM 12 MS. VOLKAR: I'M SORRY. THE INSTRUCTION IN 1206 WE  
10:30AM 13 UNDERSTAND IS THE BASELINE, BUT I'M REFERRING TO ECF 1476,  
10:30AM 14 PAGE 5, WHERE MR. BALWANI --

10:30AM 15 THE COURT: YES.

10:30AM 16 MS. VOLKAR: -- IN LINES 4 TO 5 SUGGESTS -- AND LET  
10:30AM 17 ME, I GUESS, BACK UP TO THE EASIER POSITION OF THE GOVERNMENT.

10:30AM 18 LINE 6 CHANGING "AGAINST MR. BALWANI" TO "INTRODUCED  
10:30AM 19 DURING THIS TRIAL," WE THINK THIS IS A VERSION OF WORDSMITHING  
10:30AM 20 THAT WOULD BE INAPPROPRIATE, AND WE OBJECT TO THAT.

10:30AM 21 WE THINK WHAT WORKED IN THE HOLMES CASE SHOULD BE  
10:30AM 22 SUFFICIENT HERE.

10:30AM 23 BUT I'M SPECIFICALLY REFERRING TO LINES 4 TO 5 WHERE THEY  
10:30AM 24 WANT TO ADD, "NOR SHOULD ANYTHING YOU KNOW ABOUT THE OUTCOME OF  
10:30AM 25 THE CASE AGAINST MS. HOLMES AFFECT YOUR VERDICT AS TO

10:30AM 1 MR. BALWANI."

10:31AM 2 DO YOU SEE THAT LANGUAGE?

10:31AM 3 THE COURT: RIGHT.

10:31AM 4 MS. VOLKAR: AND THE ONLY COMMENT I GUESS THE  
10:31AM 5 GOVERNMENT HAS IS THAT WE FIND IT TO BE A TAD NARROWER. IT  
10:31AM 6 TELLS THE JURY NOT TO CONSIDER THE OUTCOME OF THE TRIAL AGAINST  
10:31AM 7 MS. HOLMES.

10:31AM 8 BUT WE THINK THE JURY SHOULD BE INSTRUCTED, IF AT ALL, NOT  
10:31AM 9 TO CONSIDER THE FACT OF A TRIAL, LET ALONE IF THERE WAS AN  
10:31AM 10 OUTCOME.

10:31AM 11 AND SO THAT'S WHY WHAT THE GOVERNMENT HAS IDENTIFIED IN AN  
10:31AM 12 ATTEMPT TO BE HELPFUL IS MODEL INSTRUCTION 2.16 WHICH READS,  
10:31AM 13 "YOU HAVE HEARD EVIDENCE THAT THE DEFENDANT HAS BEEN TRIED  
10:31AM 14 BEFORE."

10:31AM 15 WE WOULD SUGGEST, "YOU HAVE HEARD EVIDENCE THAT MS. HOLMES  
10:31AM 16 HAS BEEN TRIED BEFORE. KEEP IN MIND, HOWEVER, THAT YOU MUST  
10:31AM 17 DECIDE THIS CASE SOLELY ON THE EVIDENCE PRESENTED TO YOU IN  
10:31AM 18 THIS TRIAL. YOU ARE NOT TO CONSIDER THE FACT OF A PREVIOUS  
10:32AM 19 TRIAL AGAINST MS. HOLMES IN DECIDING THIS CASE."

10:32AM 20 AND AGAIN, WE ALWAYS ADVOCATE FOR THE MODEL INSTRUCTION  
10:32AM 21 WHEN ONE IS AVAILABLE, AND WE -- IF THE GOVERNMENT -- IF THE  
10:32AM 22 DEFENDANT FEELS STRONGLY ABOUT THIS LANGUAGE, WE WILL RELENT,  
10:32AM 23 BUT WE JUST WANTED TO FLAG THAT THERE IS A MODEL INSTRUCTION  
10:32AM 24 THAT WE COULD LOOK TO IN THIS INSTANCE.

10:32AM 25 THE COURT: THANK YOU.



10:32AM 1 MS. WALSH: SO, YOUR HONOR, THIS IS THE FIRST TIME  
10:32AM 2 I'M HEARING ABOUT 2.16. IF I COULD SEE MS. VOLKAR'S COPY, THAT  
10:32AM 3 WOULD BE HELPFUL.

10:32AM 4 THE COURT: SURE. LET ME JUST SAY, I HAVE BRACKETED  
10:32AM 5 LINES 4 -- EXCUSE ME, THE SAME LINES THAT MS. VOLKAR MENTIONED  
10:32AM 6 FOR DISCUSSION. I -- LET ME JUST TELL YOU MY VISCERAL REACTION  
10:32AM 7 IS NOT TO GIVE THOSE, BUT GIVE SOMETHING, EITHER THE SAME  
10:32AM 8 INSTRUCTION THAT WE GAVE IN 1206 -- AND LET ME SAY, IN THIS  
10:32AM 9 TRIAL THERE HAVE BEEN SOME WITNESSES, ONE OR TWO PERHAPS, THAT  
10:33AM 10 HAVE MENTIONED INADVERTENTLY, NOT THROUGH A QUESTION DIRECTED  
10:33AM 11 BY COUNSEL, BUT INADVERTENTLY REFERENCED MS. HOLMES'S TRIAL.

10:33AM 12 I THINK, IF I RECALL CORRECTLY, IT MAY BE THAT ONE OR TWO  
10:33AM 13 JURORS, MAYBE NOT THE SITTING ONES, BUT HAD MENTIONED THAT THEY  
10:33AM 14 HAD HEARD SOMETHING ABOUT THE TRIAL, AND THERE'S SOME KNOWLEDGE  
10:33AM 15 ABOUT MS. HOLMES'S TRIAL I SHOULD SAY.

10:33AM 16 SO I DO THINK IT APPROPRIATE TO GIVE THE ABSENCE OF  
10:33AM 17 CODEFENDANT INSTRUCTION. I THOUGHT WHAT WE WOULD DO IS LOOK  
10:33AM 18 AND WORDSMITH IT TO SEE IF WE NEED TO ADD SOMETHING.

10:33AM 19 2.16 MIGHT BE, AND THE LANGUAGE THAT YOU SUGGEST,  
10:33AM 20 MS. VOLKAR, MIGHT BE APPROPRIATE TO EDIT THE 1206 INSTRUCTION  
10:33AM 21 NUMBER 3 THAT WAS PROVIDED IN PLACE, MS. WALSH, OF THE LANGUAGE  
10:33AM 22 THAT YOU SUGGEST IN YOUR 1476.

10:33AM 23 MS. WALSH: RIGHT.

10:33AM 24 AND SO I'M LOOKING AT 2.16, AND, AND I DON'T HAVE -- OR WE  
10:34AM 25 DON'T HAVE ANY OBJECTION TO IT.

1 BUT I DO THINK THERE WERE JURORS WHO HAD HEARD OF THE  
2 OUTCOME OF MS. HOLMES'S TRIAL, AND SO I THINK IT IS NECESSARY  
3 IN THESE CIRCUMSTANCES TO INSTRUCT THEM THAT THEY SHOULD  
4 CONSIDER NEITHER THE FACT THAT THERE WAS A PREVIOUS TRIAL NOR  
5 ANY OUTCOME THAT THEY MAY HAVE HEARD ABOUT.

6 I GUESS I DON'T SEE THE DOWNSIDE OF DOING THAT. AND WE  
7 KNOW THAT SOME JURORS HEARD ABOUT THAT.

8 THE COURT: WELL, LET ME DO THIS: I'M GOING TO PASS  
9 THIS. I'M GOING TO ALLOW YOU TO WORDSMITH IT WITH MS. VOLKAR  
10 AND MEET AND CONFER JUST IN THE INTEREST OF MOVING FORWARD.

11 WE'LL PROBABLY DO THIS ON A COUPLE. AND I'LL INVITE YOU,  
12 THE TWO OF YOU, TO LOOK AT THIS, AND WE'LL REVISIT THIS EITHER  
13 TODAY OR AT SOME POINT IN TIME.

14 SO WE'LL PASS --

15 MS. VOLKAR: YOUR HONOR --

16 THE COURT: YES.

17 MS. VOLKAR: IF I MAY, ONE MORE COMMENT FOR THE  
18 RECORD ON THAT.

19 I WILL SAY THAT DURING THE VOIR DIRE PROCESS, AS THE COURT  
20 IS AWARE, DEFENSE COUNSEL ASKED THE JURORS IF THEY HAD HEARD OF  
21 THE OUTCOME, AND MY RECOLLECTION IS THAT NONE OF THE CURRENT  
22 SITTING JURORS OR ALTERNATES HAD HEARD OF THE OUTCOME IN THE  
23 HOLMES CASE.

24 I'M STILL HAPPY TO WORK WITH MS. WALSH IN MEETING AND  
25 CONFERRING, BUT I DO WANT THE RECORD TO REFLECT, I DON'T THINK

10:35AM 1 THE SEATED JURORS HAD HEARD OF THE OUTCOME.

10:35AM 2 THE COURT: RIGHT. RIGHT.

10:35AM 3 THAT STRIKES ME AS ACCURATE, MS. WALSH.

10:35AM 4 MS. WALSH: RIGHT.

10:35AM 5 THE COURT: I KNOW THERE WAS TESTIMONY ABOUT -- FROM

10:35AM 6 A COUPLE OF THE WITNESSES IN THE HOLMES TRIAL I THINK IS THE

10:35AM 7 PHRASE THAT THEY USED.

10:35AM 8 BUT I'LL LET YOU LOOK AT THIS. WE'LL GET SOME COMPROMISE,

10:35AM 9 I'M SURE, ON THIS.

10:35AM 10 ALL RIGHT. LET'S SEE. NEXT IS 3.4.

10:36AM 11 AND I THINK I SEE YOUR SUBMISSION, MS. WALSH.

10:36AM 12 GO AHEAD.

10:36AM 13 MS. WALSH: I JUST WANT TO MAKE SURE WE'RE REFERRING

10:36AM 14 TO THE SAME PAGE. I'M LOOKING AT DOCKET 1476, INSTRUCTION 4,

10:37AM 15 AND THAT'S BASED OFF OF DOCUMENT 1206, INSTRUCTION 4, AND

10:37AM 16 THAT'S THE DECISION TO TESTIFY IN THE HOLMES CASE, NOT TO

10:37AM 17 TESTIFY IN THIS CASE.

10:37AM 18 THE COURT: CORRECT.

10:37AM 19 MS. WALSH: OKAY. OKAY.

10:37AM 20 SO WE BASED THIS OFF OF THE INSTRUCTION THAT WAS GIVEN IN

10:37AM 21 THE HOLMES CASE.

10:37AM 22 THE ADDED SENTENCE IS JUST TO EMPHASIZE TO THE JURY, WHICH

10:37AM 23 I THINK IS IMPORTANT, THAT THE RIGHT TO NOT TESTIFY IS AN

10:37AM 24 ABSOLUTE RIGHT UNDER THE CONSTITUTION.

10:37AM 25 THERE ARE MANY PEOPLE, AS SHOWN BY THE JUROR

1 QUESTIONNAIRES, WHO WOULD HOLD IT AGAINST A DEFENDANT IN A  
2 CRIMINAL TRIAL IF THEY DIDN'T HEAR FROM THAT PERSON UNDER OATH.

3 AND SO WE THINK, IN AN EXCESS OF CAUTION, TO MAKE SURE NO  
4 JUROR HAS THOSE THOUGHTS, OR THEY'RE INSTRUCTED NOT TO HAVE  
5 THOSE THOUGHTS, THAT THEY SHOULD BE INSTRUCTED THAT THE RIGHT  
6 TO NOT TESTIFY IS ABSOLUTE UNDER THE CONSTITUTION, AND IN  
7 ARRIVING AT THEIR VERDICT, THE LAW DOES NOT ALLOW THEM TO TAKE  
8 THAT INTO CONSIDERATION.

9 THE COURT: OKAY.

10 MS. VOLKAR: THE GOVERNMENT HAS NO OBJECTION TO  
11 GIVING AN INSTRUCTION ABOUT MR. BALWANI'S DECISION NOT TO  
12 TESTIFY.

13 BUT AS THE COURT FREQUENTLY SAYS, WE THINK THAT THE MODEL  
14 INSTRUCTION, WHICH IS USED IN CASES ACROSS THE NINTH CIRCUIT  
15 EVERY DAY, EVERY MONTH, WOULD SUFFICE.

16 AND IN THE GOVERNMENT'S FILING 1211 AT ECF PAGE 23, WE  
17 PROVIDED WHAT WAS 3.3, I THINK THAT MIGHT HAVE BEEN WHAT  
18 YOUR HONOR WAS REFERRING TO.

19 AND THE -- IN AN EFFORT TO CONFUSE EVERYONE, THE  
20 NINTH CIRCUIT MODEL JURY INSTRUCTIONS HAVE CHANGED DURING THE  
21 COURSE OF THIS TRIAL, AND IT IS NOW CURRENTLY NUMBER 6.3.  
22 SO -- AND THAT'S REFERENCED IN THE AUTHORITY THAT THE DEFENDANT  
23 CITES HERE.

24 DESPITE ALL OF THAT CONFUSION, IT'S NOT TOO FAR FROM THE  
25 LANGUAGE THAT THE DEFENDANT SUGGESTS, BUT I DO THINK IT DIFFERS

10:39AM 1 IN SOME KEY WAYS. IT READS, "A DEFENDANT IN A CRIMINAL CASE  
10:39AM 2 HAS A CONSTITUTIONAL RIGHT NOT TO TESTIFY. IN ARRIVING AT YOUR  
10:39AM 3 VERDICT, THE LAW PROHIBITS YOU FROM CONSIDERING IN ANY MANNER  
10:39AM 4 THAT THE DEFENDANT DID NOT TESTIFY."

10:39AM 5 I THINK THAT ADEQUATELY COVERS THE CONCERNS MS. WALSH  
10:39AM 6 RAISED, AND I DO NOT BELIEVE THAT THERE IS REASON TO FURTHER  
10:39AM 7 WORDSMITH SUCH AS ADDING "ABSOLUTE RIGHT" OR "THE UNITED STATES  
10:39AM 8 CONSTITUTION."

10:39AM 9 I THINK THE JURY WILL UNDERSTAND.

10:39AM 10 THE COURT: ALL RIGHT. THANK YOU.

10:39AM 11 MS. WALSH.

10:39AM 12 MS. WALSH: THAT'S FINE, YOUR HONOR. THANK YOU.

10:39AM 13 THE COURT: ALL RIGHT. THANK YOU. I'LL GIVE THE  
10:40AM 14 MODEL INSTRUCTION AS INDICATED BY MS. VOLKAR.

10:40AM 15 AND YOU'LL RECALL IN THE VOIR DIRE, THE COURT REFERENCED  
10:40AM 16 THIS MANY TIMES AND MY VOIR DIRE INDICATED, I BELIEVE, THE  
10:40AM 17 DEFENDANT HAS AN ABSOLUTE RIGHT NOT TO TESTIFY, AND I  
10:40AM 18 EMPHASIZED THAT SEVERAL TIMES. SO I THINK THE JURY HAS BEEN  
10:40AM 19 ADEQUATELY INFORMED ON THIS.

10:40AM 20 AND I'LL GIVE THE MODEL INSTRUCTIONS AS INDICATED.

10:40AM 21 MS. WALSH: OKAY. AND THAT'S MODEL INSTRUCTION 6.3?

10:40AM 22 THE COURT: THE NEW REVISED, THAT'S RIGHT.

10:40AM 23 MS. WALSH: YEAH.

10:40AM 24 THE COURT: OKAY. 3.5 IS REASONABLE DOUBT.

10:40AM 25 I DON'T THINK THERE'S ANY QUARREL WITH THE MODEL

10:40AM 1 INSTRUCTION.

10:40AM 2 MS. WALSH: THAT'S CORRECT, YOUR HONOR.

10:40AM 3 MS. VOLKAR: THAT'S CORRECT, YOUR HONOR.

10:40AM 4 THE COURT: THE COURT WILL GIVE THE MODEL 3.5.

10:40AM 5 3.6, "WHAT IS EVIDENCE."

10:41AM 6 MS. VOLKAR: YOUR HONOR, LET ME JUMP IN TO SAY THIS

10:41AM 7 IS ONE OF THE ALTERATIONS IN 1476 THAT THE GOVERNMENT HAS NO

10:41AM 8 OBJECTION TO. IT ACTUALLY MATCHES THE GOVERNMENT'S SUBMISSION.

10:41AM 9 THERE HAVE BEEN FACTUAL STIPULATIONS IN THIS CASE.

10:41AM 10 THE COURT: OKAY. SO THE COURT WILL GIVE 3.6, AND

10:41AM 11 THIS IS THE INSTRUCTION IN 1476, NUMBER 6, AND 1476. I'LL GIVE

10:41AM 12 THAT.

10:41AM 13 MS. VOLKAR: THAT'S CORRECT.

10:41AM 14 MS. WALSH: YES, YOUR HONOR.

10:41AM 15 THE COURT: OKAY. THEN LET'S MOVE TO, EXCUSE ME,

10:41AM 16 3.7, "WHAT IS NOT EVIDENCE."

10:41AM 17 THE COURT WOULD GIVE THE MODEL INSTRUCTION ON THIS.

10:41AM 18 MS. WALSH: YES, YOUR HONOR.

10:41AM 19 MS. VOLKAR: YES, YOUR HONOR.

10:41AM 20 THE COURT: ALL RIGHT. 3.8 IS "DIRECT AND

10:42AM 21 CIRCUMSTANTIAL EVIDENCE."

10:42AM 22 THE COURT WOULD GIVE THE MODEL INSTRUCTION.

10:42AM 23 MS. WALSH: SO, YOUR HONOR, WHEN THE COURT SAYS

10:42AM 24 YOU'LL GIVE THE MODEL INSTRUCTION, IS THAT THE INSTRUCTION IN

10:42AM 25 THE HOLMES TRIAL? ONLY BECAUSE THERE'S THE GARDEN HOSE

10:42AM 1  
10:42AM 2  
10:42AM 3  
10:42AM 4  
10:42AM 5  
10:42AM 6  
10:42AM 7  
10:42AM 8  
10:42AM 9  
10:42AM 10  
10:42AM 11  
10:43AM 12  
10:43AM 13  
10:43AM 14  
10:43AM 15  
10:43AM 16  
10:43AM 17  
10:43AM 18  
10:43AM 19  
10:43AM 20  
10:43AM 21  
10:43AM 22  
10:43AM 23  
10:43AM 24  
10:43AM 25

METAPHOR.

THE COURT: RIGHT. I WAS JUST GOING TO ASK YOU IF  
YOU WANT ME TO GIVE THAT OR NOT.

MS. WALSH: YES, PLEASE.

THE COURT: ANY OBJECTION TO THAT?

MS. VOLKAR: NO OBJECTION OTHER THAN OUR PRIOR  
DISCUSSION. WE HAVE NO PROBLEM WITH THAT.

THE COURT: THEN I'LL GIVE THE HOLMES VERSION, WHICH  
WAS JURY INSTRUCTION NUMBER 8, WHICH INCLUDES THE GARDEN HOSE  
HYPOTHETICAL.

3.9 IS "CREDIBILITY OF WITNESSES."

AGAIN, LOOKING AT THE HOLMES INSTRUCTION, THE COURT WOULD  
BE INCLINED TO GIVE THIS.

I NOTE THAT, MS. WALSH, YOU HAVE RED LINED OUT IN YOUR  
DOCUMENT, 1476, LINES 11 THROUGH 19.

MS. WALSH: YES, YOUR HONOR, AND I CAN EXPLAIN.

THE COURT: SURE.

MS. WALSH: SO THE JOINTLY PROPOSED PRELIMINARY  
INSTRUCTION ON THE CREDIBILITY OF WITNESSES THAT THE COURT  
ACCEPTED AND GAVE TO THE JURY DOES NOT HAVE THESE PARAGRAPHS IN  
IT. I THINK IT HAS ONE ADDITIONAL PARAGRAPH ABOUT IMPLICIT  
BIAS, IF I'M RECALLING IT CORRECTLY.

AND WE THINK THE SAME INSTRUCTION SHOULD BE GIVEN AGAIN  
THAT WAS GIVEN IN THE BEGINNING OF THE CASE ON CREDIBILITY OF  
WITNESSES.

1           THESE TWO PARAGRAPHS I THINK LENGTHEN UNNECESSARILY THE  
2           INSTRUCTION. I THINK THEY ARE ACTUALLY SOMEWHAT CONFUSING AND  
3           SEEM TO SOMEWHAT UNDERMINE THE FIRST PARAGRAPH WHERE THE  
4           INSTRUCTION SAYS, "YOU MAY BELIEVE EVERYTHING A WITNESS SAYS OR  
5           PART OF IT OR NONE OF IT," AND THEN IT LAYS OUT THE FACTORS TO  
6           EVALUATE A WITNESS'S TESTIMONY.

7           WE THINK THOSE TWO PARAGRAPHS, THE FIRST AND SECOND, ARE  
8           SUFFICIENT TO GIVE THE JURORS GUIDANCE AS TO HOW TO WEIGH  
9           WITNESS'S CREDIBILITY.

10           THE COURT: OKAY.

11           MS. VOLKAR.

12           MS. VOLKAR: YOUR HONOR, THIS IS LANGUAGE DRAWN  
13           DIRECTLY FROM THE NINTH CIRCUIT'S MODEL INSTRUCTION. IN THE  
14           GOVERNMENT'S FILING, IT'S LISTED AT 3.9 IN THE REVAMPED,  
15           REVISED, NOT NINTH CIRCUIT MODEL INSTRUCTIONS. IT IS NOW 6.9,  
16           BUT THE LANGUAGE IS THE SAME.

17           IT WAS GIVEN IN THE HOLMES TRIAL.

18           THERE'S NO CITATION FROM THE DEFENDANT FOR AN APPROVED  
19           INSTRUCTION GIVEN WITHOUT THESE PARAGRAPHS, BUT WE KNOW IT'S  
20           GIVEN OVER AND OVER AGAIN IN CRIMINAL TRIALS.

21           AND WITH RESPECT TO THE PRELIMINARY INSTRUCTIONS, MY  
22           RECOLLECTION IS THAT THERE'S ALSO SOME PREAMBLE THAT THE  
23           PRELIMINARY INSTRUCTIONS ARE SORT OF A SHORT VERSION OF THE  
24           INSTRUCTIONS SO THAT THE JURY CAN HAVE SOME FRAMEWORK FOR  
25           HEARING THE EVIDENCE, BUT THAT THE SORT OF LENGTHIER AND MORE



1 DETAILED INSTRUCTIONS WILL COME WITH THE FINAL INSTRUCTIONS.

2 AND, OF COURSE, ONE CLEAR EXAMPLE OF THAT IS THE  
3 DESCRIPTION OF THE ELEMENTS AND THE CHARGES WHICH ARE MORE  
4 FULLY DEFINED IN THE FINAL INSTRUCTIONS THAN THE PRELIMINARY  
5 INSTRUCTIONS.

6 IT'S IN THE MODEL. IT WAS GIVEN IN HOLMES. WE THINK THE  
7 PARAGRAPH SHOULD STAY.

8 MS. WALSH: SO, YOUR HONOR, I THINK -- I'M LOOKING  
9 AT THE STIPULATED PRELIMINARY JURY INSTRUCTIONS, WHICH IS  
10 DOCKET 1350, AND IT ADDRESSES THE CREDIBILITY OF WITNESSES. IT  
11 CONTAINS THE FIRST TWO PARAGRAPHS OF THE PATTERN INSTRUCTION.

12 THEN IT TALKS ABOUT YOU MUST AVOID BIAS, CONSCIOUS,  
13 UNCONSCIOUS, ET CETERA.

14 AND THEN THE WEIGHT OF THE EVIDENCE AS TO A FACT DOES NOT  
15 NECESSARILY DEPEND ON. THAT'S THE LAST PARAGRAPH.

16 I, I DO NOT THINK THAT THESE TWO MIDDLE PARAGRAPHS ARE  
17 NECESSARY. I THINK THAT THEY ARE INCREDIBLY CONFUSING BASED ON  
18 WHAT HAS COME BEFORE IT.

19 IT SAYS, "SOMETIMES A WITNESS MAY SAY SOMETHING THAT IS  
20 NOT CONSISTENT," AND AT THE END OF THAT PARAGRAPH IT SAYS, "YOU  
21 MAY CONSIDER THESE DIFFERENCES, BUT DO NOT DECIDE THAT  
22 TESTIMONY IS UNTRUE JUST BECAUSE IT DIFFERS FROM OTHER  
23 TESTIMONY."

24 THAT'S REALLY UP TO THE JUROR TO DECIDE, IF THE TESTIMONY  
25 IS DIFFERENT, WHETHER IT'S BELIEVABLE. AND THIS INSTRUCTION

10:46AM 1 KIND OF MANDATES THAT THEY CAN'T CONSIDER THOSE DIFFERENCES.

10:46AM 2 I THINK IT'S CONFUSING AND I THINK IT UNDERMINES THE CORE  
10:46AM 3 PARAGRAPH OF THIS INSTRUCTION.

10:46AM 4 THE COURT: OKAY.

10:46AM 5 MS. VOLKAR.

10:46AM 6 MS. VOLKAR: YOUR HONOR, I WOULD ONLY ADD THAT THE  
10:47AM 7 SENTENCE THAT MS. WALSH JUST READ I THINK UNDERCUTS THAT POINT.  
10:47AM 8 IT SAYS "YOU MAY CONSIDER," AND THEN LATER IT SAYS "BUT DO NOT  
10:47AM 9 DECIDE THAT THAT'S UNTRUE JUST BECAUSE."

10:47AM 10 I DON'T THINK IT MANDATES THE JURORS TO FIND ANYTHING.

10:47AM 11 MS. WALSH: YOUR HONOR, I JUST WANT TO ADDRESS THAT  
10:47AM 12 SECOND PARAGRAPH BECAUSE I DIDN'T ADDRESS IT.

10:47AM 13 IT SAYS, "IF YOU HAVE DECIDED THAT A WITNESS HAS  
10:47AM 14 DELIBERATELY TESTIFIED UNTRUTHFULLY ABOUT SOMETHING IMPORTANT,  
10:47AM 15 YOU MAY CHOOSE NOT TO BELIEVE ANYTHING THE WITNESS SAID."

10:47AM 16 SO THAT IMPLIES THAT IF A JUROR DECIDES THAT THERE WAS A  
10:47AM 17 DELIBERATE LIE ABOUT SOMETHING UNIMPORTANT, MAYBE THEY HAVE TO  
10:47AM 18 BELIEVE THE WITNESS.

10:47AM 19 AND THEN IT GOES ON TO SAY, "ON THE OTHER HAND, IF YOU  
10:47AM 20 THINK THE WITNESS TESTIFIED UNTRUTHFULLY ABOUT SOME THINGS, BUT  
10:47AM 21 TOLD THE TRUTH ABOUT OTHERS, YOU MAY ACCEPT THE PART THAT YOU  
10:47AM 22 THINK IS TRUE AND IGNORE THE REST."

10:47AM 23 IT JUST -- THESE TWO PARAGRAPHS SUGGEST THAT IT'S ONLY IF  
10:48AM 24 A JUROR CONCLUDES A WITNESS HAS DELIBERATELY LIED THAT THEY  
10:48AM 25 CANNOT BELIEVE ANYTHING THAT THE WITNESS SAID.

1 I THINK THAT CREDIBILITY DETERMINATIONS MAY VARY FROM  
2 JUROR TO JUROR. THEY WEIGH ALL OF THE FACTORS. THEY EVALUATE  
3 THE TESTIMONY IN LIGHT OF COMMON SENSE AND THEIR LIFE  
4 EXPERIENCE, AND THESE TWO PARAGRAPHS SEEM TO HEM THE PURVIEW OF  
5 EACH JUROR ON CREDIBILITY INTO A BOX THAT I DON'T THINK  
6 APPLIES.

7 THE COURT: ANYTHING FURTHER, MS. VOLKAR?

8 MS. VOLKAR: NOTHING FURTHER, YOUR HONOR.

9 THE COURT: ALL RIGHT. THANK YOU.

10 I THINK -- I APPRECIATE YOUR COMMENTS, MS. WALSH. YOU  
11 SUGGEST THAT THE MODEL INSTRUCTIONS SAY TOO MUCH AND PERHAPS  
12 DETRACT FROM THE JURY'S ABILITY TO WEIGH AND TO CONSIDER BY  
13 GIVING THEM TOO MANY PATHS TO FOLLOW. I APPRECIATE THAT.

14 I DO THINK THAT THE INSTRUCTIONS DON'T LACK THE CLARITY  
15 THAT YOU SUGGEST. I THINK IT DOES -- JURORS WOULD BE ABLE TO  
16 FOLLOW THE INSTRUCTIONS, PARTICULARLY THE LAST SENTENCE AND THE  
17 FIRST SENTENCE, AND THE FIRST AND SECOND PARAGRAPH WHERE THE  
18 INSTRUCTION READS, "YOU MAY CONSIDER, BUT DO NOT DECIDE THAT  
19 TESTIMONY IS UNTRUE JUST BECAUSE IT DIFFERS."

20 I THINK IT TELLS THEM, GIVES THEM CAUTION THAT JUST  
21 BECAUSE SOMEBODY SAYS SOMETHING THAT IS NOT TRUE, YOU CAN STILL  
22 BELIEVE IT IF YOU THINK IT HAS MERIT, AND YOU SHOULDN'T DECIDE  
23 IT'S UNTRUE JUST BECAUSE IT DIFFERS FROM OTHER TESTIMONY.

24 I DO THINK IT ALLOWS THE JURY AN OPPORTUNITY TO PERHAPS BE  
25 MINDFUL OF A REFLUX THAT INDIVIDUALS MIGHT TAKE, WELL, THEY

10:50AM 1 SAID SOMETHING AT ONE POINT, SO WHY SHOULD I BELIEVE ANYTHING  
10:50AM 2 THAT THEY SAY?

10:50AM 3 I THINK THAT CLARIFIES FOR THE JURORS TO GIVE THEM AN  
10:50AM 4 OPPORTUNITY TO FULLY LISTEN TO, UNDERSTAND, AND GIVES THEM  
10:50AM 5 DIRECTION AS TO THEIR THOUGHT PROCESS.

10:50AM 6 MAYBE IT'S TOO MUCH INFORMATION FOR THEM, BUT I DON'T FIND  
10:50AM 7 THAT IT, IT DETRACTS FROM THAT CREDIBILITY BALANCING AT ALL.

10:50AM 8 I DO THINK THAT IT ACTUALLY PROVIDES SOME GUIDANCE.

10:50AM 9 NOW, THE PRELIMINARY INSTRUCTIONS WERE JUST THAT, THEY  
10:50AM 10 WERE PRELIMINARY, AND AS YOU RECALL, WHEN THE COURT GAVE THE  
10:50AM 11 PRELIMINARY INSTRUCTIONS, AT THE CONCLUSION, THE COURT  
10:50AM 12 INDICATED THAT THEY WOULD, THE JURY WOULD RECEIVE FURTHER  
10:50AM 13 INSTRUCTIONS AND GUIDANCE IN THE FINAL INSTRUCTIONS.

10:50AM 14 THAT'S WHAT THIS IS AS I TAKE IT. THIS IS ADDITIONAL  
10:51AM 15 SUPPLEMENTAL INFORMATION THAT ASSISTS THEM.

10:51AM 16 SO I'LL GIVE THE MODEL INSTRUCTION, WHICH IS THE  
10:51AM 17 INSTRUCTION THAT WAS GIVEN IN THE HOLMES CASE, INSTRUCTION  
10:51AM 18 NUMBER 9, AND I'LL GIVE THAT, NOTING THE OBJECTIONS, OF COURSE.

10:51AM 19 ALL RIGHT. LET'S MOVE TO 3.10, "ACTIVITIES NOT CHARGED."  
10:51AM 20 THIS IS ON 1476. LET'S SEE. IS THAT -- PAGE 8. YES.

10:51AM 21 MS. WALSH.

10:51AM 22 MS. WALSH: YES, YOUR HONOR.

10:51AM 23 SO WE INCLUDED THIS EXTRA LANGUAGE TO ACCOUNT FOR WHAT I  
10:52AM 24 WOULD SAY WAS A FAIR AMOUNT OF EVIDENCE THAT CAME FROM  
10:52AM 25 WITNESSES ABOUT TIME PERIODS BEFORE MR. BALWANI WAS CHARGED AND

1 STATEMENTS THAT WERE MADE NOT BY MR. BALWANI BUT BY MS. HOLMES  
2 DURING THOSE EARLIER TIME PERIODS.

3 I DO THINK THAT IT'S HELPFUL TO THE JURY AND IT'S  
4 IMPORTANT TO MAKE CLEAR THAT HE'S NOT ON TRIAL FOR CONDUCT THAT  
5 PREDATES THE TIME PERIODS IN THE INDICTMENT.

6 EVEN THOUGH THE JURORS HEARD LOTS OF EVIDENCE ABOUT  
7 STATEMENTS BY MS. HOLMES IN 2006 AND '07, AND '08, THOSE CANNOT  
8 FORM THE BASIS -- OR THE JURORS SHOULD BE INSTRUCTED THAT HE'S  
9 NOT ON TRIAL FOR THOSE TIME PERIODS.

10 AND I UNDERSTAND THAT I FEEL LIKE THIS IS GOING TO BE A  
11 REFRAIN FROM THE GOVERNMENT THAT WE'RE GOING TO STICK WITH THE  
12 PATTERN INSTRUCTIONS.

13 I THINK THAT JURY INSTRUCTIONS SHOULD ALSO TAKE INTO  
14 ACCOUNT THE EVIDENCE THAT HAS BEEN ELICITED IN THE CASE AND NOT  
15 JUST BE IN A VACUUM. AND I THINK THIS -- ADDING THIS TEXT  
16 WOULD HELP THEM UNDERSTAND THE INSTRUCTION AND CABIN WHAT WE ON  
17 THE DEFENSE TEAM WERE CONCERNED ABOUT, THAT THEY WOULD HEAR  
18 EVIDENCE IN EARLY PERIODS, EVIDENCE IN THE FORM OF STATEMENTS  
19 BY MS. HOLMES, AND CONCLUDE BASED ON THOSE THAT HE WAS GUILTY  
20 DURING THE CHARGED TIME PERIOD.

21 THE COURT: OKAY.

22 MS. VOLKAR: YOUR HONOR, NOT ONLY WILL IT BE A  
23 COMMON REFRAIN FROM THE GOVERNMENT TO STICK TO THE MODEL  
24 INSTRUCTION, HERE IT WAS 3.10, AND I BELIEVE IN THE REVISED  
25 MODEL INSTRUCTIONS IT'S NOW 6.10, BUT IT'S ALSO GOING TO BE A

10:53AM 1 COMMON REFRAIN FROM THE GOVERNMENT THAT THIS IS THE EXACT SAME  
10:54AM 2 ARGUMENT THAT WE HAD, THE GOVERNMENT VERSUS THE HOLMES DEFENSE  
10:54AM 3 TEAM, AND IT WAS REGARDING THE SAME 2006 TIME PERIOD CONDUCT  
10:54AM 4 BECAUSE THAT WAS ALSO OUTSIDE OF THE INDICTMENT AGAINST  
10:54AM 5 MS. HOLMES.

10:54AM 6 SO I'M GOING TO REPEAT SOME OF MY ARGUMENTS HERE, BUT I  
10:54AM 7 DID WANT TO IDENTIFY THAT WE HAVE HAD THIS ARGUMENT BEFORE.

10:54AM 8 IN THE HOLMES CASE, AND THE SAME IS TRUE HERE, IT'S THE  
10:54AM 9 GOVERNMENT'S POSITION THAT THIS INSTRUCTION MAY NOT NEED TO BE  
10:54AM 10 GIVEN AT ALL, AND THE REASON FOR THAT IS THE -- I'M GOING TO  
10:54AM 11 REFER TO IT AS 3.10 BECAUSE I'M STUCK IN THE PAST -- BUT THE  
10:54AM 12 3.10 INSTRUCTION TYPICALLY IS ENVISIONING 404(B) CONDUCT OR  
10:54AM 13 TYPES OF CONDUCT WHERE IT COULD GENUINELY CONFUSE THE JURY  
10:54AM 14 ABOUT WHAT THE PERSON IS ON TRIAL FOR.

10:54AM 15 WHAT MS. WALSH IS TALKING ABOUT IS TIME PERIODS OUTSIDE OF  
10:54AM 16 THE INDICTMENT.

10:54AM 17 WE'RE GOING TO GET TO THE DEFINITION OF THE SUBSTANTIVE  
10:55AM 18 CHARGES IN JUST A MOMENT. THE TIME PERIODS ARE CLEARLY DEFINED  
10:55AM 19 THROUGHOUT. THEY WERE CLEARLY DEFINED BY THE COURT IN THE  
10:55AM 20 PRELIMINARY INSTRUCTIONS, IN PART BECAUSE OF THE DIALOGUE THE  
10:55AM 21 PARTIES HAVE HAD THROUGHOUT THIS TRIAL ABOUT THE PRE-2009  
10:55AM 22 EVENTS THAT OCCURRED.

10:55AM 23 YOU HEARD THE GOVERNMENT'S ELICITING OF EVIDENCE FROM  
10:55AM 24 THOSE WITNESSES AS TYING THAT 2006 -- THOSE 2006 STATEMENTS TO  
10:55AM 25 WHAT THEIR BASE OF KNOWLEDGE WAS FOR WHEN THEY INVESTED IN 2013

1 DURING THE CHARGED PERIOD.

2 AND I DON'T BELIEVE THAT THERE WILL BE ANY CONFUSION ON  
3 THE PART OF THE JURORS OF WHAT IS INSIDE THE CHARGED PERIOD AND  
4 WHAT IS OUTSIDE THE CHARGED PERIOD BECAUSE IT WILL BE CLEARLY  
5 DEFINED IN MULTIPLE INSTRUCTIONS THROUGHOUT THIS PACKET.

6 NOW, THAT BEING SAID, A -- I WON'T CALL IT A COMPROMISE,  
7 BUT A MIDDLE GROUND THAT WAS REACHED IN THE LAST TRIAL WAS  
8 THERE WAS AN INSTRUCTION ON THIS TOPIC, 3.10, AGAIN NOW IT'S  
9 6.10, AND THAT IS WHAT THE COURT ULTIMATELY GAVE.

10 AND WE WOULD ARGUE FOR THE SAME REASONS AND THE SAME  
11 RATIONALE, IF AN INSTRUCTION NEED BE GIVEN IF AT ALL, IT SHOULD  
12 BE THE MODEL INSTRUCTION FOR 3.10, WHICH COVERS AN EVEN BROADER  
13 ARRAY OF TOPICS IF THE JURY IS CONFUSED ABOUT ANY OTHER CONDUCT  
14 OR IF -- I DON'T KNOW IF MS. WALSH IS GOING TO SAY THAT THERE  
15 HAS BEEN 404(B) EVIDENCE IN THIS TRIAL, BUT IT CAN GO EVEN  
16 BEYOND JUST THE TIME PERIODS.

17 THE TIME PERIODS ARE CLEARLY COVERED LATER IN THE JURY  
18 INSTRUCTIONS AS WELL.

19 THE COURT: SO ARE YOU ADVOCATING THAT THE COURT  
20 GIVE JURY INSTRUCTION NUMBER 10 THAT WAS GIVEN IN THE HOLMES  
21 CASE?

22 MS. VOLKAR: GIVEN WHERE WE ARE, YOUR HONOR, AND  
23 BECAUSE THE PARTIES LARGELY AGREE WE SHOULD FOLLOW WHAT WAS  
24 DONE IN THE HOLMES CASE, THE GOVERNMENT'S POSITION RIGHT NOW IS  
25 IF AN INSTRUCTION IS GIVEN, GIVE WHAT WAS GIVEN IN THE HOLMES

10:57AM 1 CASE.

10:57AM 2 THE COURT: OKAY.

10:57AM 3 MS. WALSH: YES. SO PART OF THE PROBLEM IS THIS  
10:57AM 4 INSTRUCTION COMES BEFORE AN INSTRUCTION ON THE SUBSTANTIVE  
10:57AM 5 OFFENSES, AND SO THE JURORS HEARING THIS FOR THE FIRST TIME, I  
10:57AM 6 DON'T KNOW WHAT THE TIME PERIOD IS.

10:57AM 7 AND AS FAR AS WHETHER THE 6.10 IS APPROPRIATE ONLY FOR  
10:57AM 8 404(B) OR NOT, WE'RE LAWYERS TALKING ABOUT THAT.

10:57AM 9 THE JURORS HAVE NO IDEA WHAT IS 404(B), WHAT CAME IN AS  
10:57AM 10 INEXTRICABLY INTERTWINED, WHAT CAME IN AS CONTEXT FOR EARLY  
10:57AM 11 INVESTORS INVESTING IN THERANOS.

10:57AM 12 ALL THEY KNOW IS THEY HEARD TESTIMONY ABOUT  
10:57AM 13 ELIZABETH HOLMES MAKING ALL KINDS OF STATEMENTS ABOUT THERANOS  
10:57AM 14 AND THE TECHNOLOGY BEFORE MR. BALWANI GOT TO THE COMPANY THAT I  
10:57AM 15 SUSPECT THE GOVERNMENT MAY ARGUE WERE UNTRUE OR AT LEAST  
10:57AM 16 PROVIDED THE GROUNDWORK THAT LED TO THE MISREPRESENTATIONS IN  
10:57AM 17 THE CHARGED PERIOD.

10:57AM 18 SO I THINK IT'S IMPORTANT TO INSTRUCT THE JURY IN THIS WAY  
10:58AM 19 SO THAT THERE'S NO LACK OF CLARITY.

10:58AM 20 AND I DON'T SEE ANY DOWNSIDE TO DOING IT. THERE'S NOTHING  
10:58AM 21 INACCURATE IN THIS ADDED TEXT. IT JUST MAKES IT CLEAR.

10:58AM 22 THE COURT: OKAY. THANK YOU.

10:58AM 23 WELL, TO YOUR POINT ABOUT THE LOCATION OF THE INSTRUCTION,  
10:58AM 24 IT MAY BE THAT WE MOVE THE LOCATION OF THIS INSTRUCTION TO  
10:58AM 25 LATER WHEN IT'S CLOSER TO THE ACTUAL CHARGES THAT ARE READ AND



10:58AM 1 THE DEFINITION OF THE OFFENSES, AND MAYBE THAT'S MORE  
10:58AM 2 APPROPRIATE.

10:58AM 3 I'M GOING TO GIVE THE INSTRUCTION THAT WAS GIVEN IN THE  
10:58AM 4 HOLMES CASE. I DON'T THINK THAT THE ADDITIONAL LANGUAGE THAT  
10:58AM 5 IS SUGGESTED, LINES 4 THROUGH 8 IN YOUR SUBMISSION, 1476,  
10:58AM 6 PAGE 8, ARE NECESSARY.

10:58AM 7 WHEN WE GET TO THE OTHER INSTRUCTIONS, THE JURY IS GOING  
10:58AM 8 TO BE INFORMED OF THE TIME PERIOD THAT THEY MUST CONSIDER. I  
10:59AM 9 BELIEVE THAT THOSE CHARGES WILL SO INSTRUCT.

10:59AM 10 THE GOVERNMENT IS NOT GOING TO BE PERMITTED TO ARGUE THAT  
10:59AM 11 THE JURY SHOULD CONVICT FOR ANY CONDUCT OUTSIDE OF THAT PERIOD.

10:59AM 12 AND, MS. VOLKAR, I'M TELLING YOUR TEAM THAT NOW, AND I  
10:59AM 13 THINK YOU'RE AWARE OF THAT.

10:59AM 14 MS. VOLKAR: UNDERSTOOD.

10:59AM 15 THE COURT: YOU'RE NOT PERMITTED TO ARGUE FOR  
10:59AM 16 ANYTHING ELSE. IT'S JUST THIS PARTICULAR TIME PERIOD.

10:59AM 17 SO THE OBJECTION IS NOTED. I'LL GIVE WHAT WAS GIVEN IN  
10:59AM 18 THE HOLMES CASE UNDER ACTIVITIES NOT CHARGED. THAT APPEARS ON  
10:59AM 19 PAGE 11 OF DOCUMENT 1206.

11:00AM 20 ALL RIGHT. NEXT IS 3.11, WHICH IS SEPARATE CONSIDERATION  
11:00AM 21 OF MULTIPLE COUNTS, SINGLE DEFENDANT.

11:00AM 22 I DON'T THINK THERE'S ANY OBJECTION TO THAT.

11:00AM 23 MS. WALSH: NO, YOUR HONOR.

11:00AM 24 MS. VOLKAR: NO, YOUR HONOR.

11:00AM 25 THE COURT: ALL RIGHT. THE COURT WILL GIVE THAT.

11:00AM 1 AND IT WILL CHANGE -- AGAIN, REFERENCING THE HOLMES  
11:00AM 2 INSTRUCTIONS, IT'S JURY INSTRUCTION NUMBER 11. AND IN 1206  
11:00AM 3 WE'LL CHANGE THE NAME TO MR. BALWANI.  
11:00AM 4 "ON OR ABOUT" IS NEXT, 3.18.  
11:00AM 5 MS. WALSH.  
11:00AM 6 MS. WALSH: YES. THE ONLY CHANGE ON THIS -- I'M  
11:00AM 7 LOOKING AT DOCUMENT -- AT DOCKET 1476 AT PAGE 10. OUR ONLY  
11:01AM 8 PROPOSED CHANGE RELATES TO THE COUNT NUMBERS THAT APPLY IN THIS  
11:01AM 9 CASE.  
11:01AM 10 THE COURT: 1476, ECF 10.  
11:01AM 11 MS. WALSH: CORRECT, 1476 AT ECF 10, ECF PAGE 10.  
11:01AM 12 THE COURT: AND I THINK IT'S 9 OF THE DOCUMENT?  
11:01AM 13 MS. WALSH: CORRECT, YES.  
11:01AM 14 THE COURT: OKAY.  
11:01AM 15 MS. VOLKAR: IT MAY BE BENEFICIAL TO INFORM THE  
11:01AM 16 COURT, WHEN I READ OFF A LIST OF NUMBERS EARLIER, THIS WAS ONE  
11:01AM 17 OF THEM, AND THERE ARE GOING TO BE SEVERAL IN THIS CATEGORY  
11:01AM 18 WHERE THE ONLY CHANGE TO THE HOLMES INSTRUCTIONS THAT  
11:01AM 19 MR. BALWANI RECOMMENDS IS TO ACCOUNT FOR THE FACT THAT IN THE  
11:01AM 20 HOLMES TRIAL, THE -- DUE TO AN ORDER OF THE COURT, THE  
11:01AM 21 GOVERNMENT DISMISSED COUNT NINE.  
11:01AM 22 THAT IS STILL AT PLAY IN THIS TRIAL.  
11:01AM 23 SO THE GOVERNMENT DOES NOT OBJECT TO THE EDITS TO THE  
11:01AM 24 INSTRUCTIONS GIVEN IN THE HOLMES CASE THAT APPEARS IN  
11:01AM 25 MR. BALWANI'S FILING, 1476, ECF PAGE 10, THE BOTTOM OF THE

11:02AM 1 DOCUMENT, PAGE 9, AND SO THERE WILL BE SEVERAL IN THIS  
11:02AM 2 CATEGORY.

11:02AM 3 THE COURT: SURE.

11:02AM 4 MS. VOLKAR: AND THIS IS THE FIRST OF THEM.

11:02AM 5 THE COURT: OKAY. THANK YOU. THANKS FOR THAT.

11:02AM 6 AND THEN THANK YOU FOR THAT CLARIFICATION, THAT AGREEMENT.

11:02AM 7 THE COURT WILL GIVE THAT. THAT IS THE DIFFERENCE, THE  
11:02AM 8 DISTINCTION. THERE WAS A MISSING COUNT IN MS. HOLMES CASE.

11:02AM 9 ALL RIGHT. LET'S MOVE THEN ON TO WHAT I HAVE NEXT IN  
11:02AM 10 MR. BALWANI'S LIST IN 1476 IS THE DUAL ROLE TESTIMONY.

11:02AM 11 MS. VOLKAR: YOUR HONOR, THE GOVERNMENT HAS AN  
11:02AM 12 ADDITION BEFORE THIS.

11:02AM 13 THE COURT: IS THIS 4.14?

11:02AM 14 MS. VOLKAR: CORRECT, IN THE GOVERNMENT'S EDITION.  
11:02AM 15 YES, SORRY, IT'S 4.14. I JUST LOOKED AT THE NUMBER.

11:03AM 16 THE COURT: RIGHT.

11:03AM 17 AND HOW WOULD YOU HAVE THIS READ? I HAVE YOUR SUBMISSION  
11:03AM 18 HERE. IT READS, "YOU HAVE HEARD TESTIMONY FROM," AND THEN  
11:03AM 19 INSERT EXPERT NAMES, "WHO TESTIFIED TO THEIR OPINIONS AND THE  
11:03AM 20 REASONS FOR THEIR OPINIONS," AND IT GOES FURTHER.

11:03AM 21 IS THE CHANGE ADDING THE NAMES OF THE EXPERTS?

11:03AM 22 MS. VOLKAR: THAT'S CORRECT, YOUR HONOR. AND THE  
11:03AM 23 MAIN -- AND THIS TIES WITH WHERE I THINK WE WERE, WHICH WAS  
11:03AM 24 ECF 1476, ECF PAGE 11, BOTTOM OF THE LINE, PAGE 10, THE  
11:03AM 25 DEFENDANTS RECOMMENDS ADDING RICHARD SONNIER TO THE DUAL ROLE

11:03AM 1 TESTIMONY, AND THE GOVERNMENT STRENUOUSLY OBJECTS TO THAT  
11:03AM 2 CATEGORIZATION.

11:03AM 3 MR. SONNIER HAS BEEN PROFFERED AS AN EXPERT. I BELIEVE  
11:03AM 4 JUST TWO DAYS AGO MR. COOPERSMITH WAS SAYING HE HAS NO PERSONAL  
11:03AM 5 KNOWLEDGE OF THE FACTS AND, THEREFORE, HE DOES NOT FALL UNDER  
11:04AM 6 THE MODEL INSTRUCTIONS FOR DUAL ROLE TESTIMONY, HE FALLS UNDER  
11:04AM 7 THE MODEL INSTRUCTION FOR EXPERT TESTIMONY.

11:04AM 8 AND THAT IS 4.14. UNDER THE REVISED MODEL INSTRUCTIONS,  
11:04AM 9 IT'S NOW 3.14. AGAIN, THE TEXT IS THE SAME.

11:04AM 10 SO OUR SUBMISSION HAS 4.14 ON ECF 1211, PAGE 31, AND WE  
11:04AM 11 WOULD RECOMMEND INSERTING "RICHARD SONNIER, III" THERE AND HAVE  
11:04AM 12 THAT INSTRUCTION EITHER PRECEDE OR COME AFTER THE DUAL ROLE  
11:04AM 13 TESTIMONY. WE DON'T FEEL STRONGLY ABOUT REPLACEMENT.

11:04AM 14 BUT WE DO FEEL STRONGLY THAT HE IS NOT A FACT WITNESS, AND  
11:04AM 15 THAT IS IN STARK CONTRAST TO DR. ZACHMAN AND DR. BURNES WHO HAD  
11:04AM 16 PERCIPIENT KNOWLEDGE OF WORKING WITH THEIR PATIENTS AND  
11:04AM 17 RECEIVING RESULTS, AND THEN AT A CERTAIN TIME IN THEIR  
11:04AM 18 TESTIMONY, WERE QUALIFIED AS AN EXPERT TO DESCRIBE IN THEIR  
11:04AM 19 EXPERIENCE THEIR INTERPRETATION OF THOSE RESULTS AND WHAT THAT  
11:05AM 20 MEANT, AND THEY HAD TO BE QUALIFIED AS AN EXPERT TO DO THAT  
11:05AM 21 PORTION.

11:05AM 22 BUT OF COURSE THEY HAD PERCIPIENT KNOWLEDGE RELEVANT TO  
11:05AM 23 THIS CASE AND, THEREFORE, THEY ARE TRUE DUAL ROLES.

11:05AM 24 MS. WALSH: YOUR HONOR, WHAT I SUGGEST IS THAT WE  
11:05AM 25 DEFER THIS QUESTION UNTIL AFTER MR. SONNIER TESTIFIES AND WE

11:05AM 1 SEE WHAT HIS TESTIMONY IS.

11:05AM 2 MS. VOLKAR: YOUR HONOR, THE GOVERNMENT'S REACTION  
11:05AM 3 TO THAT IS THAT THE EXPANSION OF MR. SONNIER'S TESTIMONY HAS  
11:05AM 4 ALREADY BEGUN.

11:05AM 5 WE HAVE HEARD OVER AND OVER AGAIN THAT HE IS TO TESTIFY AS  
11:05AM 6 AN EXPERT ON MICROSOFT SQL DATABASES.

11:05AM 7 WE WERE TOLD BY MR. COOPERSMITH ON MONDAY THAT HE HAS NO  
11:05AM 8 PERSONAL KNOWLEDGE OF THE FACTS.

11:05AM 9 BUT IF THEIR TRUE PURPOSE IS JUST TO GET IN FACTS THROUGH  
11:05AM 10 A WITNESS WHO HAS NO PERSONAL KNOWLEDGE OF THEM, I GUESS THE  
11:05AM 11 FIREWORKS ARE ALREADY STARTING.

11:05AM 12 MS. WALSH: I SEE NO FIREWORKS.

11:05AM 13 I JUST THINK IT MAKES SENSE TO DEFER UNTIL AFTER WE HEAR  
11:06AM 14 HIS TESTIMONY.

11:06AM 15 HE CLEARLY WAS NOTICED AS AN EXPERT. HE'S GOING TO GIVE  
11:06AM 16 EXPERT TESTIMONY.

11:06AM 17 I JUST DON'T KNOW -- I DON'T THINK WE SHOULD LAND ON AN  
11:06AM 18 ANSWER ON THIS UNTIL WE HEAR FROM HIM.

11:06AM 19 THE COURT: WELL, WHAT FACTS WOULD HE TESTIFY TO?

11:06AM 20 MS. WALSH: SO I'M NOT EXAMINING MR. SONNIER. MAYBE  
11:06AM 21 I COULD ASK A COLLEAGUE OF MINE TO PROFFER TO THE COURT.

11:06AM 22 THE COURT: I THINK MS. VOLKAR IS ACCURATE WHEN WE  
11:06AM 23 HEARD THAT HE'S GOING TO TESTIFY AS AN EXPERT.

11:06AM 24 MS. WALSH: SURE, SURE.

11:06AM 25 THE COURT: MR. BRECHER, WHO IS BEHIND YOU NOW, SAID

11:06AM 1 "ALL HE'S GOING TO SAY IS I'M AN EXPERT AND YOU CAN'T DO IT, OR  
11:06AM 2 YOU COULD DO IT," AND THAT'S IT.

11:06AM 3 MS. WALSH: YES.

11:06AM 4 THE COURT: NOW, I DID ASK THE PARTIES A COUPLE OF  
11:06AM 5 DAYS AGO, I THINK IT WAS YESTERDAY, TO PROVIDE FOR ME, I ASKED  
11:06AM 6 MR. COOPERSMITH TO PROVIDE FOR ME THE DOCUMENT THAT WAS  
11:06AM 7 RECEIVED FROM THE GOVERNMENT, THAT EMAIL, WHATEVER IT WAS, AND  
11:06AM 8 IT WAS GOING TO BE LEFT WITH ME YESTERDAY.

11:06AM 9 I HAVEN'T RECEIVED IT YET, AND THAT MAYBE INFORMS ON THIS  
11:07AM 10 AS WELL.

11:07AM 11 MR. BRECHER, GOOD MORNING.

11:07AM 12 MR. BRECHER: GOOD MORNING, YOUR HONOR.

11:07AM 13 YES, IT'S THAT DOCUMENT AND ONE ADDITIONAL ITEM OF  
11:07AM 14 PERCIPIENT KNOWLEDGE, YOUR HONOR, AND THAT IS MR. SONNIER'S  
11:07AM 15 PERSONAL TESTING OF THE ENCRYPTED COPY TO ENSURE HIMSELF THAT  
11:07AM 16 IT COULD NOT, IN FACT, BE OPENED.

11:07AM 17 THAT IS A FACT WITNESS.

11:07AM 18 THE COURT: THIS IS THE FIRST I HEAR OF THIS.

11:07AM 19 MR. BRECHER: WELL, YOUR HONOR, I DON'T KNOW THAT  
11:07AM 20 IT'S NECESSARY TO NOTICE A FACT WITNESS IN ADVANCE OF  
11:07AM 21 CALLING -- FACT TESTIMONY IN ADVANCE OF CALLING A WITNESS.

11:07AM 22 THE COURT: WELL, I SAY THAT BECAUSE THE LAST TIME  
11:07AM 23 WE CHATTED, YOU SAID, "ALL HE'S GOING TO TESTIFY ABOUT, JUDGE,  
11:07AM 24 IS THIS."

11:07AM 25 MR. BRECHER: WELL, YOUR HONOR, I THINK MY

11:07AM 1 RECOLLECTION IS THAT I WAS DISCUSSING THE OPINIONS THAT HE WAS  
11:07AM 2 GOING TO OFFER.

11:07AM 3 THE COURT: I SEE.

11:07AM 4 MR. BRECHER: BUT IF THAT'S A DISTINCTION THAT  
11:07AM 5 MATTERS, I DON'T HAVE TO ELICIT THAT TESTIMONY.

11:07AM 6 BUT I THOUGHT IT MIGHT BE SOMETHING THAT THE GOVERNMENT  
11:07AM 7 WANTED CONFIRMED ON THE RECORD, BUT I MAY BE MISTAKEN ABOUT  
11:08AM 8 THAT.

11:08AM 9 THE COURT: OKAY.

11:08AM 10 MS. VOLKAR.

11:08AM 11 MS. VOLKAR: I'M HAPPY TO DEFER, YOUR HONOR.

11:08AM 12 I THINK WE ALL SEE THE STORM HEADING OUR WAY, AND I'M  
11:08AM 13 HAPPY TO DEFER ON THIS INSTRUCTION UNTIL A LATER POINT IN TIME.  
11:08AM 14 WE NEED NOT REARGUE A TOPIC THAT IS VERY FAMILIAR TO THE COURT,  
11:08AM 15 BUT THE GOVERNMENT DOES WANT TO STATE ITS POSITION THAT  
11:08AM 16 RICHARD SONNIER IS ONLY AN EXPERT, NOT A DUAL ROLE TESTIMONY,  
11:08AM 17 EXPERT/FACT WITNESS.

11:08AM 18 AND EVEN WHAT MR. BRECHER JUST SAID ABOUT TESTING THE  
11:08AM 19 DATABASE STILL SEEMS TO FALL UNDER THE BASES FOR HIS EXPERT  
11:08AM 20 OPINION.

11:08AM 21 BUT ANYWAY, I'M HAPPY TO DEFER UNTIL LATER.

11:08AM 22 MR. BRECHER: IF YOUR HONOR WOULD PREFER TESTIMONY  
11:08AM 23 OF THAT SORT OFFERED AS OPINION, I THINK IT'S -- I THINK IT'S  
11:09AM 24 WHAT HE ACTUALLY DID AND PERSONALLY OBSERVED, BUT I HAVE NO  
11:09AM 25 OBJECTION.

11:09AM 1 BUT I DO THINK IT'S APPROPRIATE TO DEFER THIS QUESTION TO  
11:09AM 2 SEE HOW IT COMES INTO EVIDENCE, IF IT COMES INTO EVIDENCE AT  
11:09AM 3 ALL.

11:09AM 4 THE COURT: ALL RIGHT. WE'LL DEFER THIS.

11:09AM 5 MR. BRECHER: THANK YOU, YOUR HONOR.

11:09AM 6 THE COURT: OKAY.

11:09AM 7 MR. BRECHER: I APOLOGIZE, YOUR HONOR.

11:09AM 8 ONE MORE CLARIFICATION IN TERMS OF THE ISSUE OF  
11:09AM 9 MR. SONNIER'S EFFORTS TO OPEN AN ENCRYPTED COPY. I'LL JUST  
11:09AM 10 NOTE FOR THE RECORD THAT MR. SCHENK SENT AN EMAIL ABOUT THAT  
11:09AM 11 TOPIC FIVE DAYS AGO ON JUNE 3RD WITH NEW INFORMATION. SO IN  
11:09AM 12 RELATION TO --

11:09AM 13 THE COURT: IS THIS RELATED TO --

11:09AM 14 MR. BRECHER: -- TO THE FACTS.

11:10AM 15 THE COURT: I'M SORRY. IS THAT RELATED TO THE  
11:10AM 16 INSTRUCTIONS?

11:10AM 17 MR. BRECHER: NO. I'M SORRY, YOUR HONOR. I  
11:10AM 18 APOLOGIZE, YOUR HONOR.

11:10AM 19 THE ISSUE OF MR. SONNIER'S EFFORTS TO DECRYPT THE  
11:10AM 20 ENCRYPTED COPY OF THE LIS DATABASE.

11:10AM 21 MR. SCHENK PROVIDED SOME NEW INFORMATION IN AN EMAIL TO  
11:10AM 22 THE DEFENSE ON JUNE 3RD.

11:10AM 23 THE COURT: MR. SCHENK.

11:10AM 24 MR. SCHENK: YOUR HONOR, I KEEP WAITING FOR  
11:10AM 25 MR. BRECHER TO FINISH THAT SENTENCE. I'M NOT SURE I UNDERSTAND



11:10AM 1 THE EFFECT THAT HAS -- IT'S TRUE, I SENT AN EMAIL THAT PROVIDED  
11:10AM 2 INFORMATION THAT THE GOVERNMENT LEARNED IN AN ATTORNEY PROFFER  
11:10AM 3 TO THE DEFENSE.

11:10AM 4 MR. BRECHER TOLD THAT TO THE COURT IN THE CONTEXT OF  
11:10AM 5 WHETHER AN EXPERT WITNESS THAT THE DEFENSE IS CALLING IS GOING  
11:10AM 6 TO CROSS OVER INTO FACT WITNESS TESTIMONY.

11:10AM 7 THE INFORMATION THAT I PROVIDED HAS NOTHING TO DO WITH  
11:10AM 8 MR. SONNIER. I'M NOT SURE -- IT SEEMS LIKE A NON SEQUITUR TO  
11:10AM 9 ME I GUESS IS WHAT I'M SAYING.

11:11AM 10 THE COURT: THANK YOU FOR THE HEADS UP. I'M NOT  
11:11AM 11 SURE WHAT TO DO WITH THAT, BUT I'M SURE IT WILL COME UP AT SOME  
11:11AM 12 POINT IN TIME. SO THANK YOU.

11:11AM 13 MR. BRECHER: THANK YOU, YOUR HONOR.

11:11AM 14 MS. VOLKAR: AND, YOUR HONOR, ON THE JURY  
11:11AM 15 INSTRUCTIONS, IT MAY BE WELCOME NEWS TO HEAR THAT I THINK THE  
11:11AM 16 NEXT TWO ARE ONES THAT THE PARTIES LARGELY AGREE ON, WHICH IS  
11:11AM 17 14 WAS GIVEN IN THE HOLMES CASE, ECF 1206, PAGE 15. IT'S THE  
11:11AM 18 MODEL INSTRUCTION ABOUT CHARTS OR SUMMARIES NOT ADMITTED INTO  
11:11AM 19 EVIDENCE.

11:11AM 20 AND THE VERY NEXT INSTRUCTION IN 1206 WAS NUMBER 15,  
11:11AM 21 CHARTS AND EVIDENCE THAT WERE ADMITTED BECAUSE A PARALEGAL FOR  
11:11AM 22 WILLIAMS & CONNOLLY TESTIFIED ABOUT ADMITTED CHARTS IN  
11:11AM 23 EVIDENCE.

11:11AM 24 I UNDERSTAND FROM THE DEFENSE'S FILING LAST NIGHT, ECF  
11:11AM 25 1476 AT 12, DELETING THE INSTRUCTION "CHARTS AND SUMMARIES

11:12AM 1 ADMITTED INTO EVIDENCE," THAT THE DEFENSE -- I'M SORRY, THAT  
11:12AM 2 MR. BALWANI IS NOT INTENDING, THROUGH THE PARALEGAL FROM ORRICK  
11:12AM 3 THAT THEY PLAN TO CALL, TO SIMILARLY ADMIT CHARTS AND  
11:12AM 4 SUMMARIES, AND IF THAT'S TRUE, THERE HAVE BEEN NO OTHER CHARTS  
11:12AM 5 OR SUMMARIES ADMITTED IN THIS TRIAL AND IT IS THEREFORE PROPER  
11:12AM 6 TO NOT GIVE THAT INSTRUCTION.

11:12AM 7 MS. WALSH: CORRECT, YOUR HONOR.

11:12AM 8 THE COURT: ALL RIGHT. SO WE WON'T GIVE 417, MODEL  
11:12AM 9 417, WHICH ARE "CHARTS AND SUMMARIES ADMITTED INTO EVIDENCE."

11:12AM 10 I DON'T BELIEVE THERE WERE ANY ADMITTED INTO EVIDENCE YET.  
11:12AM 11 THERE WERE CERTAINLY REFERENCES TO CHARTS AND SUMMARIES.  
11:12AM 12 SO THE 416 WILL BE GIVEN.

11:12AM 13 ANY OBJECTION TO THAT?

11:12AM 14 MS. VOLKAR: NO, YOUR HONOR. THAT'S CORRECT.

11:12AM 15 MS. WALSH: NO OBJECTION, YOUR HONOR.

11:13AM 16 THE COURT: ALL RIGHT. 416 WOULD BE GIVEN. THAT IS  
11:13AM 17 JURY INSTRUCTION NUMBER 14 IN DOCKET 1206, THAT WOULD BE GIVEN.

11:13AM 18 ALL RIGHT. NOW WE MOVE TO NEXT I SEE ON THE LIST THAT WAS  
11:13AM 19 PROVIDED IS NUMBER 16, THIS IS ON 1476 IN THE CHART, IT IS  
11:13AM 20 "CONSPIRACY ELEMENTS."

11:13AM 21 AND THIS IS 8.20 IN THE MODEL, I BELIEVE.

11:13AM 22 MS. WALSH.

11:13AM 23 MS. WALSH: YES, YOUR HONOR.

11:13AM 24 THE ONLY PROPOSED CHANGE THAT WE HAVE IS ON DOCKET 1476 AT  
11:13AM 25 DOCKET PAGE 14.

1 WE REQUEST THAT THE ADDED TEXT BETWEEN "TWO OR MORE OTHER  
2 PEOPLE" BE INSERTED IN THAT SENTENCE. SO IT WOULD READ,  
3 "FURTHERMORE, ONE WHO WILLFULLY JOINS AN EXISTING CONSPIRACY  
4 BETWEEN TWO OR MORE OTHER PEOPLE IS AS RESPONSIBLE FOR IT AS  
5 THE ORIGINATORS."

6 IT'S REALLY JUST FOR CLARITY, YOUR HONOR. THAT'S WHY WE  
7 ADDED IT.

8 THE COURT: MS. VOLKAR.

9 MS. VOLKAR: IT WILL NOT SURPRISE THE COURT TO HEAR  
10 THE GOVERNMENT SAY THAT IT'S NOT IN THE MODEL, AND, THEREFORE,  
11 WE DON'T THINK IT NEEDS TO BE ADDED.

12 WE DO NOTE THAT THE SAME LANGUAGE IS REFERENCED BOTH  
13 EARLIER IN THE INSTRUCTION AND JUST A COUPLE OF LINES LATER AS  
14 WELL. SO I DO NOT THINK THAT THERE WILL BE ANY CONFUSION.

15 MORE IMPORTANTLY, I WANT TO TAKE THIS MOMENT TO SAY THAT  
16 THIS WOULD BE ONE OF THOSE INSTRUCTIONS WHERE THE GOVERNMENT  
17 STANDS BY ITS OBJECTIONS TO THE SPECIFIC UNANIMITY INSTRUCTION  
18 THAT IS GIVEN.

19 A GENERIC UNANIMITY INSTRUCTION IS DETERMINED TO BE  
20 PERFECTLY ACCEPTABLE IN THOSE CASES.

21 THIS IS AN INSTRUCTION IN THE HOLMES CASE THAT WE DID A  
22 LOT OF WORK ON, AND THE GOVERNMENT'S POSITION IS THAT NO  
23 FURTHER TWEAKING IS NECESSARY. THE INSTRUCTION THAT WAS GIVEN  
24 IN HOLMES SHOULD SUFFICE.

25 I WILL ALSO NOTE THAT THE MODEL INSTRUCTION AS REFERENCED

11:15AM 1 IN THE GOVERNMENT'S FILING IS 8.20 AS THE COURT SAID.

11:15AM 2 IF YOU WERE TO LOOK FOR IT NOW ON THE NINTH CIRCUIT'S  
11:15AM 3 WEBSITE, IT IS 11.1. AGAIN, IT IS ADDING TO THE CONFUSION.  
11:15AM 4 BUT JUST FOR EVERYONE'S BENEFIT, I DID WANT TO REFERENCE THAT.

11:15AM 5 THE COURT: THANK YOU FOR THAT.

11:15AM 6 AND I'M REFERENCING THE PACKET THAT WAS FILED PREVIOUSLY  
11:15AM 7 BY THE GOVERNMENT AND IT DOESN'T HAVE THAT. OF COURSE IT WAS  
11:15AM 8 PREMODIFICATION. BUT JUST FOR CLARITY OF OUR CONVERSATION,  
11:15AM 9 THAT'S WHY I'M REFERENCING THAT. AND, OF COURSE, THINGS HAVE  
11:15AM 10 CHANGED.

11:16AM 11 MS. VOLKAR: I DID QUITE A BIT OF PARING UP LAST  
11:16AM 12 NIGHT, YOUR HONOR, SO I VERY MUCH UNDERSTAND.

11:16AM 13 THE COURT: I THINK WE ALL WOULD WELCOME THE  
11:16AM 14 NINTH CIRCUIT PUBLISHING ANOTHER HARD COPY. I THINK THE LAST  
11:16AM 15 HARD COPY THAT I THINK I HAVE IN MY LIBRARY WAS 2010. I THINK  
11:16AM 16 THAT'S THE LAST HARD COPY THAT WE HAVE RECEIVED.

11:16AM 17 MS. WALSH.

11:16AM 18 MS. WALSH: YES, YOUR HONOR.

11:16AM 19 SO WE REQUEST THAT THE COURT STICK WITH THE INSTRUCTION  
11:16AM 20 THAT WAS GIVEN IN THE HOLMES CASE, DOCKET 1206 AT DOCKET --  
11:16AM 21 PAGE 17.

11:16AM 22 AGAIN, OUR ONLY REQUEST WAS TO ADD THAT LITTLE BIT OF  
11:16AM 23 LANGUAGE FOR CLARITY PURPOSES, AND SUBMIT IT ON THAT POINT.

11:16AM 24 THE COURT: OKAY. THANK YOU.

11:16AM 25 I SEE THE ADDITIONAL LANGUAGE THAT YOU'RE SUGGESTING. I

11:16AM 1 DON'T BELIEVE IT'S NECESSARY. I BELIEVE THAT THE INSTRUCTION  
11:16AM 2 AS TO THIS CONSPIRACY GIVEN IN THE HOLMES MATTER IN DOCKET  
11:17AM 3 1206, PAGES 17 AND 18, IS SUFFICIENT, AND THE COURT WILL GIVE  
11:17AM 4 THAT.

11:17AM 5 ALL RIGHT. GOING DOWN YOUR CHART, MS. WALSH. YOUR NUMBER  
11:17AM 6 17 IS "WILLFULLY," AND I KNOW THE GOVERNMENT HAS OPINIONS ABOUT  
11:17AM 7 THIS, AND THIS IS 5.5, I THINK FORMERLY NUMBER 5.5. I THINK  
11:17AM 8 IT'S STILL THE SAME.

11:17AM 9 DO YOU WANT TO AUGMENT ANY ARGUMENTS? I KNOW YOU'VE  
11:17AM 10 INCORPORATED YOUR STRENUOUS OBJECTIONS TO THE COURT.

11:17AM 11 MS. VOLKAR: AND I CERTAINLY WON'T REPEAT THEM AT  
11:17AM 12 LENGTH HERE, ONLY TO SAY, AS WE PREVIOUSLY SAID, THE BRYAN CASE  
11:18AM 13 IS INAPPLICABLE TO THESE STATUTES. WILLFULLY DOES NOT APPEAR  
11:18AM 14 IN SECTION 1343 OR 1349. IT IS A HEIGHTENED MENS REA.

11:18AM 15 KNOWINGLY IS THE PROPER STANDARD. WE'RE GOING TO GET  
11:18AM 16 THERE IN A MOMENT.

11:18AM 17 SO WITH THAT I WILL SUBMIT. I UNDERSTAND IT WAS GIVEN IN  
11:18AM 18 THE HOLMES CASE, AND I UNDERSTAND THAT THE COURT PLANS TO GIVE  
11:18AM 19 IT HERE.

11:18AM 20 MS. WALSH: YES, YOUR HONOR, WE ARE IN FAVOR OF THE  
11:18AM 21 COURT GIVING THIS INSTRUCTION AS IT DID IN THE HOLMES CASE.

11:18AM 22 THE COURT: ALL RIGHT. THANK YOU.

11:18AM 23 I'LL NOTE THAT I THINK MR. LEACH GAVE THE OBJECTIONS IN  
11:18AM 24 THE LAST -- IN THE HOLMES CASE, AND YOU'VE INCORPORATED THOSE  
11:18AM 25 OBJECTIONS AND I REMEMBER THEM VIVIDLY. I RECOGNIZE THEM.

11:18AM 1 AND I WILL GIVE JURY INSTRUCTION 17 THAT WAS GIVEN IN THE  
11:18AM 2 HOLMES CASE AT DOCUMENT 1206, AND RECOGNIZING THE GOVERNMENT'S  
11:19AM 3 OBJECTION, THE COURT WILL GIVE "WILLFULLY" IN THIS MATTER AS  
11:19AM 4 WELL.

11:19AM 5 NEXT THEN IS NUMBER 18 ON YOUR CHART, WHICH IS 8.23,  
11:19AM 6 "KNOWLEDGE AND ASSOCIATION WITH OTHER CONSPIRATORS."

11:19AM 7 MS. WALSH: AND WE ARE NOT REQUESTING ANY FURTHER  
11:19AM 8 ARGUMENT ON THAT INSTRUCTION.

11:19AM 9 MS. VOLKAR: YOUR HONOR, THERE WAS SOME MINOR TWEAKS  
11:19AM 10 MADE FOR THE INSTRUCTION GIVEN IN HOLMES. THE GOVERNMENT HAS  
11:19AM 11 IDENTIFIED THEM AND WILL INCORPORATE THEM AND ASSUMES THE COURT  
11:19AM 12 INTENDS TO GIVE THE SAME INSTRUCTIONS AS IN HOLMES, AND WE HAVE  
11:19AM 13 NO FURTHER OBJECTION BESIDES THAT DISCUSSION.

11:19AM 14 THE COURT: THANK YOU. IF YOU WOULD MAKE THOSE  
11:19AM 15 CHANGES THEN.

11:19AM 16 MS. VOLKAR: I WILL, YOUR HONOR.

11:19AM 17 THE COURT: AND THEY DO INCLUDE THE CHANGING OF THE  
11:20AM 18 NAMES, OF COURSE, AND OTHERS.

11:20AM 19 BUT THE COURT WILL GIVE THEN THE INSTRUCTION THAT IT GAVE  
11:20AM 20 IN THE HOLMES CASE, 1206, IT'S INSTRUCTION NUMBER 18, WITH  
11:20AM 21 THOSE MODIFICATIONS.

11:20AM 22 NEXT IS 19, 8.25, "CONSPIRACY/LIABILITY FOR SUBSTANTIVE  
11:20AM 23 OFFENSE COMMITTED BY COCONSPIRATOR."

11:20AM 24 MS. WALSH: YES, YOUR HONOR.

11:20AM 25 AND THE ONLY CHANGE PROPOSED FROM THE DEFENSE IS TO JUST

11:20AM 1 CHANGE THE NUMBER OF THE COUNTS, AND I SEE FROM MS. VOLKAR'S  
11:20AM 2 LIST THAT SHE GAVE AT THE OUTSET, THIS IS ONE OF THE ONES THAT  
11:20AM 3 SHE AGREES ON AS WELL.

11:20AM 4 THE COURT: RIGHT.

11:20AM 5 MS. VOLKAR: THAT'S CORRECT. WE HAVE NOTHING  
11:20AM 6 FURTHER BEYOND THE OBJECTIONS DISCUSSED IN THE HOLMES MATTER,  
11:20AM 7 SO WE AGREE WITH THE CHANGE THAT MR. BALWANI RECOMMENDS.

11:20AM 8 THE COURT: ALL RIGHT. THANK YOU.

11:20AM 9 THIS IS IN ESSENCE THE PINKERTON, I BELIEVE; IS THAT  
11:20AM 10 RIGHT?

11:20AM 11 MS. WALSH: YES.

11:20AM 12 MS. VOLKAR: YES. PARDON ME.

11:20AM 13 THE COURT: AND THEN YOU'LL MAKE THOSE CHANGES NEXT,  
11:21AM 14 AND THE COURT WILL GIVE THE INSTRUCTION AS GIVEN IN THE HOLMES  
11:21AM 15 CASE, WHICH WAS INSTRUCTION 19, I BELIEVE.

11:21AM 16 MS. WALSH: YES.

11:21AM 17 THE COURT: ALL RIGHT. NEXT IS "WIRE FRAUD," NUMBER  
11:21AM 18 2824.

11:21AM 19 MS. WALSH.

11:21AM 20 MS. WALSH: YES, YOUR HONOR.

11:21AM 21 SO WE PROPOSED SOME ADDED LANGUAGE AT THE BOTTOM OF DOCKET  
11:21AM 22 1476, DOCKET PAGE 17. AND WE PROPOSED THIS LANGUAGE LARGELY  
11:21AM 23 BECAUSE OF THE TESTIMONY OF MS. BENNETT AND THE CMS REPORT,  
11:21AM 24 WHICH BOTH CONTAINED FINDINGS RELATED TO REGULATORY VIOLATIONS,  
11:21AM 25 LAB PRACTICES THAT DON'T -- OR THAT ARE LARGELY BASED ON A

11:22AM 1 NEGLIGENCE STANDARD, AND WE THINK IT IS IMPORTANT TO CLARIFY  
11:22AM 2 FOR THE JURY AS TO WHAT MR. BALWANI IS ACCUSED OF WITH REGARD  
11:22AM 3 TO THE PATIENT FRAUD CASE.

11:22AM 4 AND SO WHAT THE ESSENCE OF IT IS, YOU KNOW, WHAT DOES  
11:22AM 5 MR. BALWANI HAVE TO KNOW TO BE GUILTY OF A PATIENT FRAUD COUNT?

11:22AM 6 THE COURT: IS THIS -- EXCUSE ME FOR INTERRUPTING  
11:22AM 7 YOU. IS THIS LINE 20?

11:22AM 8 MS. WALSH: YES, 20 THROUGH 23.

11:22AM 9 THE COURT: ALL RIGHT. THANK YOU.

11:22AM 10 MS. WALSH: YOU KNOW, IS IT ENOUGH THAT HE KNOWS  
11:22AM 11 THAT THERE MAY HAVE BEEN ISSUES IN THE OPERATIONS OF THE LAB?

11:22AM 12 MS. BENNETT TESTIFIED ABOUT EXPIRED REAGENTS NOT BEING  
11:22AM 13 NOTICED BY LAB STAFF, REFRIGERATION ISSUES, ALL -- YOU KNOW,  
11:22AM 14 THE GAMUT OF LAB ISSUES, THAT THERE WERE TEST ERRORS THAT --  
11:22AM 15 OTHER WITNESSES TESTIFIED LABS HAVE ERRORS.

11:23AM 16 OR DOES HE NEED TO KNOW SOMETHING MORE, AND SPECIFICALLY,  
11:23AM 17 WHAT?

11:23AM 18 SO WHAT WE DID WAS WE TOOK THE LANGUAGE LARGELY FROM THE  
11:23AM 19 INDICTMENT, WHICH WE THINK IS THE CRUX OF THE CHARGE, AND WHAT  
11:23AM 20 WE PROPOSE IS, "THE GOVERNMENT HAS ALLEGED THAT MR. BALWANI  
11:23AM 21 ENGAGED IN A SCHEME TO DEFRAUD PATIENTS OUT OF THEIR MONEY  
11:23AM 22 THROUGH REPRESENTATIONS ABOUT THERANOS'S BLOOD TESTS AND THAT  
11:23AM 23 THOSE REPRESENTATIONS WERE FALSE BECAUSE THERANOS WAS NOT  
11:23AM 24 CAPABLE OF CONSISTENTLY PRODUCING ACCURATE AND RELIABLE BLOOD  
11:23AM 25 TEST RESULTS."



11:23AM 1 SO I THINK IT'S CRITICAL TO INFORM THE JURY AS TO WHAT THE  
11:23AM 2 ESSENCE OF THE CHARGE IS SO THAT THE JURORS DON'T REACH A  
11:23AM 3 VERDICT OF CRIMINAL LIABILITY BASED ON A NEGLIGENCE STANDARD OR  
11:23AM 4 BASED ON LAB PRACTICES THAT ARE NOT REALLY THE SUBJECT OF THIS  
11:24AM 5 CASE, AND MANY OF THOSE WERE IN THE TESTIMONY OF MS. BENNETT.

11:24AM 6 THE COURT: MS. VOLKAR.

11:24AM 7 MS. VOLKAR: THANK YOU, YOUR HONOR.

11:24AM 8 I HAVE THREE MAIN RESPONSES TO THAT. FIRST, I'LL START  
11:24AM 9 WITH MS. WALSH'S -- OR WHERE MS. WALSH ENDED, WHICH WAS THE  
11:24AM 10 CONCERN ABOUT MR. BALWANI BEING CONVICTED OF LAB PRACTICES.

11:24AM 11 YOU MAY RECALL, AND IT'S LATER IN THE PACKET, BUT  
11:24AM 12 MS. HOLMES ARGUED FOR AND, OVER THE GOVERNMENT'S OBJECTION, THE  
11:24AM 13 COURT GAVE A VIOLATION OF INDUSTRY STANDARDS AND REGULATIONS.

11:24AM 14 SO I WANT TO HIGHLIGHT, AND I KNOW WE'RE GOING TO GET TO  
11:24AM 15 THAT INSTRUCTION, THAT THERE'S ALREADY AN INSTRUCTION MEANT TO  
11:24AM 16 PUT UP GUARDRAILS ON THAT POINT.

11:24AM 17 THE SECOND THING I WANT TO MENTION IS THE FOUR LINE  
11:25AM 18 ADDITION HERE MAKES THE PORTION ABOUT THE PATIENT FRAUD MUCH  
11:25AM 19 LENGTHIER AND DIFFERENT THAN JUST THE TOP OF THE PAGE, THE TWO  
11:25AM 20 TO THREE LINES, ABOUT THE INVESTOR FRAUD.

11:25AM 21 AND SOME JUROR MAY LOOK AT THAT AND SAY, HUH, WHY IS ONE  
11:25AM 22 FRAUD DEFINED, AND THE OTHER FRAUD NOT?

11:25AM 23 SO I THINK IT CREATES AN INEQUITY IN THE VERY SAME  
11:25AM 24 INSTRUCTION BETWEEN THE TWO FRAUDS.

11:25AM 25 AND BEFORE I LEAVE THAT POINT, OF COURSE YOUR HONOR WILL

11:25AM 1 REMEMBER MS. HOLMES SUBMITTED WHAT I RECALL TO BE A THREE OR  
11:25AM 2 FOUR PAGE LENGTH VERSION OF THIS INSTRUCTION DETAILING AT GREAT  
11:25AM 3 LENGTH THE FRAUDS.

11:25AM 4 AND ONE OF THE DISCUSSIONS THAT WE HAD AT THAT POINT IN  
11:25AM 5 TIME IN THE LAST TRIAL WAS, DOES IT VARY FROM THE INDICTMENT?

11:25AM 6 AND THAT BRINGS ME TO MY THIRD POINT. YOUR HONOR OFFERED  
11:25AM 7 TO SEND THE INDICTMENT BACK WITH THE JURY IN THE LAST TRIAL,  
11:26AM 8 AND THE DEFENSE CHOSE TO PARE DOWN TO THIS VERSION RATHER THAN  
11:26AM 9 HAVE THE INDICTMENT GO BACK.

11:26AM 10 AND I WANT TO REITERATE WHY YOUR HONOR SUGGESTED THAT AND  
11:26AM 11 WHY THERE'S A CONCERN.

11:26AM 12 WHAT MS. WALSH SAID IS THAT THEY PULLED THIS LANGUAGE  
11:26AM 13 LARGELY FROM THE INDICTMENT.

11:26AM 14 BUT WHEN YOU LOOK AT THE INDICTMENT, ECF 469, THEY HAVE  
11:26AM 15 ATTEMPTED -- THEY, THE DEFENSE, HAVE ATTEMPTED TO SUMMARIZE  
11:26AM 16 FOUR PARAGRAPHS DESCRIBING THE SCHEME TO DEFRAUD PATIENTS,  
11:26AM 17 PARAGRAPHS 15, 16, AND 17, SORRY, AND 18, AND THEY'VE TRIED TO  
11:26AM 18 SUMMARIZE THAT INTO FOUR OR FIVE LINES.

11:26AM 19 I HAVE NO DOUBT THAT THESE LAWYERS ARE EXCELLENT AT  
11:26AM 20 SUMMARIZING. BUT ANY TIME WE ARE SUMMARIZING, PARAPHRASING,  
11:26AM 21 USING THE WORDS THAT THE LAWYERS THINK BEST, WE ARE AT RISK OF  
11:27AM 22 MOVING AWAY FROM WHAT THE GRAND JURY FOUND IN THE SUPERSEDING  
11:27AM 23 INDICTMENT.

11:27AM 24 AND I JUST WANT TO FLAG THAT I THINK THERE'S A RISK THERE.  
11:27AM 25 NOW, I ALSO WANT TO GO BACK TO WHAT THE ACTUAL TEXT SAYS.

1 EVERYTHING THAT MS. WALSH JUST ARGUED I BELIEVE THE DEFENSE CAN  
2 ALSO ARGUE IN THEIR CLOSING ARGUMENT.

3 THE STANDARD OF WIRE FRAUD, THE ELEMENTS OF WIRE FRAUD,  
4 WHICH ARE DEFINED ON THE VERY NEXT PAGE, I THINK COULD NOT  
5 POSSIBLY LEAVE THE JURY WITH THE IMPRESSION THAT NEGLIGENT  
6 CONDUCT WOULD BE SUFFICIENT. THAT'S NOT WHAT THE ELEMENTS OF  
7 WIRE FRAUD ARE, AND THAT'S NOT WHAT THE ELEMENTS OF WIRE FRAUD  
8 REQUIRE.

9 SO I JUST WANT TO GO BACK TO I THINK THERE ARE GUARDRAILS  
10 THROUGHOUT THE INSTRUCTION. I THINK IT CREATES AN INEQUITY  
11 WITH THE INVESTOR FRAUD COUNTS.

12 I DON'T THINK THE SOLUTION IS ADDING MORE TEXT FOR THE  
13 SAME REASONS THAT WE ARGUED LAST GO-ROUND.

14 IF MORE EXPLANATION NEED BE GIVEN TO THE JURY, WE CAN  
15 CONSIDER PROVIDING THEM WITH THE INDICTMENT. THOSE ARE THE  
16 WORDS THAT THE GRAND JURY FOUND.

17 MS. WALSH: SO I THINK THERE'S A SERIOUS RISK OF  
18 JURORS REACHING A CONCLUSION OF CRIMINAL GUILT BASED ON A  
19 NEGLIGENCE STANDARD RELATING TO THE LAB.

20 THEY COULD RECALL TESTIMONY ABOUT PAPERWORK BEING SIGNED  
21 RIGHT BEFORE THE CMS INSPECTION AND THAT BEING IMPROPER, AND  
22 TESTIMONY ABOUT DR. DHAWAN SIGNING HUNDREDS OF SOP'S IN ADVANCE  
23 OF THE CMS INSPECTION, TESTIMONY ABOUT A PINK LABEL NOT BEING  
24 NOTICED BY LAB STAFF THAT WOULD PUT THEM ON NOTICE THAT REAGENT  
25 WOULD BE EXPIRED.

11:28AM 1           THERE WERE A LOT OF -- I DON'T WANT TO MINIMIZE THE  
11:28AM 2           VIOLATIONS -- BUT RELATIVELY SMALL COMPARED TO FRAUD VIOLATIONS  
11:28AM 3           THAT A JUROR COULD CONCLUDE THAT MR. BALWANI IS GUILTY BECAUSE  
11:28AM 4           IT WAS A SHODDY LAB.

11:29AM 5           THAT'S NOT WHAT THE INDICTMENT CHARGES. THE INDICTMENT  
11:29AM 6           CHARGES FRAUD BASED ON MR. BALWANI'S UNDERSTANDING OF THE  
11:29AM 7           CAPABILITY OF THERANOS'S TECHNOLOGY. THAT'S THE ESSENCE OF THE  
11:29AM 8           CASE, AND I THINK THE JURY SHOULD KNOW THAT.

11:29AM 9           THE COURT: DOESN'T JURY INSTRUCTION NUMBER 28 IN  
11:29AM 10          DOCUMENT 1206 INFORM THE JURY OF THIS? AND THIS WAS THE REASON  
11:29AM 11          THAT THE COURT GAVE THIS AS PROPHYLACTIC SUCH THAT THE JURY  
11:29AM 12          WOULD NOT VENTURE INTO A PINK LABEL, SIGNING LAB PROTOCOLS.  
11:29AM 13          THAT'S WHY THE COURT GAVE THAT.

11:29AM 14          I'M AHEAD OF MYSELF NOW, BUT THE COURT INTENDS TO GIVE  
11:29AM 15          THIS AS WELL, "THIS" MEANING INSTRUCTION 28 IN DOCKET 1206 FOR  
11:29AM 16          THE VERY REASONS THAT YOU POINT OUT, MS. WALSH.

11:29AM 17          I -- DURING THE HOLMES TRIAL, I HAD EXPRESSED CONCERN  
11:29AM 18          OUTSIDE OF THE PRESENCE OF THE JURY TO COUNSEL THAT THE  
11:30AM 19          EVIDENCE REGARDING THE LAB AND ANY PROBLEMS WITH THE LAB WOULD  
11:30AM 20          NOT BE PERMITTED BY THE GOVERNMENT TO -- AS A BASIS FOR A  
11:30AM 21          CRIMINAL CONVICTION. ANY CIVIL PROBLEMS WITH THE LAB WOULD NOT  
11:30AM 22          FORM THE BASIS FOR A CRIMINAL CONVICTION.

11:30AM 23          AND I'VE TOLD THE GOVERNMENT THAT THEY COULDN'T ARGUE  
11:30AM 24          THAT, THEY TOLD ME -- AND THEY DIDN'T ARGUE THAT. THEY TOLD ME  
11:30AM 25          THEY WOULDN'T, AND THEY DIDN'T ARGUE THAT.

11:30AM 1 THAT WAS THE CONCERN THAT I HAD, AND THAT'S WHY THE COURT  
11:30AM 2 GAVE THAT PARTICULAR INSTRUCTION.

11:30AM 3 I INTEND TO GIVE IT AGAIN IN THIS CASE FOR THE VERY  
11:30AM 4 REASONS THAT YOU MENTION. IT'S PROPHYLACTIC AS TO GIVING THE  
11:30AM 5 JURY GUIDANCE THAT THEY MAY NOT, THEY MAY NOT CONSIDER THAT.

11:30AM 6 IN LIGHT OF THAT, I DON'T BELIEVE IT IS NECESSARY TO GIVE  
11:30AM 7 THE ADDITIONAL INFORMATION IN THE WIRE FRAUD AS YOU SUGGEST.

11:31AM 8 AND I'M HAPPY TO MOVE THAT AROUND. IF YOU THINK YOU WOULD  
11:31AM 9 LIKE TO MOVE WHAT WAS INSTRUCTION 28 TO A DIFFERENT LOCATION  
11:31AM 10 FOLLOWING THESE, I'LL -- I'M HAPPY TO HEAR FROM YOU ABOUT THAT,  
11:31AM 11 AS WE'RE GOING TO DO WITH ANOTHER INSTRUCTION PERHAPS. THE  
11:31AM 12 ORDER MIGHT BE MORE TEMPORAL IF IT'S CLOSELY RELATED TO THE  
11:31AM 13 ACTUAL SUBSTANTIVE INSTRUCTIONS.

11:31AM 14 BUT I'M GOING TO RESPECTFULLY DECLINE YOUR INVITATION TO  
11:31AM 15 ADD THE ADDITIONAL LANGUAGE IN THE WIRE FRAUD, UNDERSTANDING  
11:31AM 16 THAT THE COURT WILL GIVE, AS I SAID, THE ALLEGED VIOLATIONS OF  
11:31AM 17 REGULATIONS AND INDUSTRY STANDARDS.

11:31AM 18 AND THE COURT FINDS THAT THAT -- THAT THAT GIVES THE JURY  
11:31AM 19 GUIDANCE, AND ALSO TELLS THEM WHAT THEY MAY NOT DO, THEY MAY  
11:31AM 20 NOT DO TO AVOID THE DANGER OF MIXING THE CIVIL VIOLATIONS IN  
11:31AM 21 ANY WAY, IN ANY WAY WITH A CRIMINAL -- OR ALLEGED CIVIL  
11:32AM 22 VIOLATIONS IN ANY WAY WITH ANY ALLEGED CRIMINAL CONDUCT.

11:32AM 23 MS. WALSH: YES, YOUR HONOR.

11:32AM 24 MAY I BE HEARD JUST ONE MORE TIME ON THIS?

11:32AM 25 THE COURT: SURE, OF COURSE.

11:32AM 1 MS. WALSH: I THINK THAT WOULD HELP TO MOVE THAT  
11:32AM 2 INSTRUCTION SO THAT IT IS BEFORE A DESCRIPTION OF THE WIRE  
11:32AM 3 FRAUD, SO I DO THINK THAT WOULD HELP.

11:32AM 4 I GUESS I -- THE INSTRUCTION ITSELF, I'M CONCERNED THAT  
11:32AM 5 THE JURORS WILL STILL EITHER NOT BE CLEAR, OR REACH A VERDICT  
11:32AM 6 BASED ON IMPROPER GROUNDS, AND THAT'S BECAUSE THE  
11:32AM 7 INSTRUCTION -- AND I'M LOOKING AT INSTRUCTION NUMBER 28 IN  
11:32AM 8 1206 -- IT SAYS, "MS. HOLMES IS NOT LIABLE FOR ANY OF THE  
11:32AM 9 OFFENSES ALLEGED IN THE INDICTMENT MERELY BECAUSE SHE OR  
11:32AM 10 THERANOS MAY HAVE VIOLATED FEDERAL OR STATE REGULATIONS" OR  
11:32AM 11 ENGAGED IN NEGLIGENCE ESSENTIALLY.

11:32AM 12 FINE. THAT'S GREAT.

11:32AM 13 BUT THEN THE SECOND SENTENCE SAYS, "HOWEVER, YOU MAY  
11:33AM 14 CONSIDER SUCH EVIDENCE, ALONG WITH OTHER EVIDENCE, LIMITED TO  
11:33AM 15 ANY PURPOSE," AND "ANY PURPOSES FOR WHICH THE EVIDENCE WAS  
11:33AM 16 ADMITTED IN ASSESSING WHETHER THE GOVERNMENT HAS PROVED EACH OF  
11:33AM 17 THE COUNTS CHARGED IN THE INDICTMENT."

11:33AM 18 AND IT JUST SEEMS LIKE THAT LAST SENTENCE KIND OF UNDOES  
11:33AM 19 THE FIRST, AND I AM CONCERNED THAT IN ASSESSING WHETHER  
11:33AM 20 MR. BALWANI COMMITTED WIRE FRAUD, A JUROR MIGHT LOOK AT THIS  
11:33AM 21 LAST SENTENCE AND SAY, WELL, I CAN CONSIDER THE LAB'S  
11:33AM 22 NEGLIGENCE IN ASSESSING WHETHER THE GOVERNMENT PROVED THE  
11:33AM 23 COUNTS CHARGED IN THE INDICTMENT.

11:33AM 24 THE COURT: MS. VOLKAR.

11:33AM 25 MS. VOLKAR: YOUR HONOR, I'M NOT SURPRISED TO HEAR

11:33AM 1 MS. WALSH MAKE THAT ARGUMENT. IT'S THE EXACT SAME ARGUMENT  
11:33AM 2 THAT WE HAD WITH -- THAT THE GOVERNMENT HAD WITH THE HOLMES  
11:33AM 3 COUNSEL.

11:33AM 4 AND TO ADD A LITTLE BIT MORE COLOR TO THE HISTORY THAT THE  
11:33AM 5 COURT ACCURATELY GAVE, THE GOVERNMENT DID NOT INITIALLY SUGGEST  
11:33AM 6 THIS INSTRUCTION IN THE HOLMES CASE. THE HOLMES TEAM DID.

11:34AM 7 DURING THE COURSE OF THE TRIAL YOUR HONOR INDICATED, AS  
11:34AM 8 YOUR HONOR RECOUNTED, THAT SUCH AN INSTRUCTION WOULD LIKELY BE  
11:34AM 9 NECESSARY.

11:34AM 10 SO DURING THE MEET AND CONFER PROCESS, WHAT THE NEW SORT  
11:34AM 11 OF LAY OF THE LAND BECAME WAS THAT THE GOVERNMENT AND  
11:34AM 12 MS. HOLMES'S COUNSEL ARGUING ABOUT WHAT LANGUAGE SHOULD GO INTO  
11:34AM 13 THAT INSTRUCTION. THAT'S WHAT RESULTED HERE.

11:34AM 14 MS. HOLMES'S TEAM ALSO OBJECTED TO THAT SENTENCE THAT  
11:34AM 15 MS. WALSH JUST READ. I BELIEVE THEY HAD A MUCH LENGTHIER  
11:34AM 16 INSTRUCTION THAT THEY WANTED TO GIVE THAT WENT INTO MORE  
11:34AM 17 DETAIL.

11:34AM 18 THIS IS WHERE THE COURT LANDED.

11:34AM 19 AND I WANT TO SAY, WHY IS THAT LANGUAGE THERE?

11:34AM 20 MY RECOLLECTION IS BECAUSE, AS THE GOVERNMENT WAS ARGUING  
11:34AM 21 AT THE TIME, THE EVIDENCE CAN GO TO FALSITY.

11:34AM 22 SO ONE OF THE KEY REASONS THAT WE HAVE ALWAYS ARGUED THE  
11:34AM 23 CMS REPORT SHOULD COME IN IS THAT IT HELPS TO DEMONSTRATE THE  
11:34AM 24 FALSITY OF THE STATEMENTS REGARDING THE ACCURACY AND  
11:34AM 25 RELIABILITY OF THERANOS TESTS. AND THAT'S ONE -- I MAY BE

1 FORGETTING OTHERS -- AND THERE MAY HAVE BEEN OTHER ARGUMENTS  
2 THAT WE MADE LAST TIME THAT I WANT TO INCORPORATE, BUT THERE'S  
3 VERY SPECIFICALLY A REASON FOR THAT SENTENCE.

4 AND MY UNDERSTANDING FROM THE DEFENDANT'S FILING LAST  
5 NIGHT WAS THAT I THOUGHT THAT THEY WERE NOT GOING TO CHALLENGE  
6 ANY OF THAT LANGUAGE.

7 IF WE ARE REOPENING THAT, I'M HAPPY TO REFRESH MYSELF ON  
8 OTHER ARGUMENTS.

9 MS. WALSH: YOUR HONOR, MAY I BE HEARD IN RESPONSE?

10 THE COURT: YES.

11 MS. WALSH: SO, FIRST OF ALL, THIS WAS THE  
12 INSTRUCTION IN THE HOLMES CASE WHERE MS. BENNETT DID NOT  
13 TESTIFY AND DID NOT GIVE ALL OF THE DETAILS SHE DID IN THIS  
14 CASE, SO I DO THINK IT'S A DIFFERENT SET OF CIRCUMSTANCES.

15 AND I UNDERSTAND WHAT MS. VOLKAR IS SAYING, THAT THE LAST  
16 SENTENCE CAN GO TO FALSITY, OR EVIDENCE OF NEGLIGENCE CAN GO TO  
17 FALSITY.

18 BUT I GUESS THAT'S THE WHOLE POINT. FALSITY OF WHAT?

19 AND MS. VOLKAR JUST SAID FALSITY RELATING TO THE ACCURACY  
20 AND RELIABILITY OF THE THERANOS TESTS.

21 THAT'S EXACTLY WHAT I WANT TO PUT IN THE WIRE FRAUD  
22 INSTRUCTION. WHAT FALSITY ARE WE TALKING ABOUT?

23 THE COURT: SO LET ME GIVE YOU THIS OPPORTUNITY, IF  
24 YOU WISH TO AUGMENT LANGUAGE, PERHAPS THIS INSTRUCTION IS THE  
25 PLACE TO ADD A SENTENCE OR TWO AND NOT, AND NOT THE ACTUAL



11:36AM 1 SUBSTANTIVE INSTRUCTION.

11:36AM 2 AND I'LL -- WHY DON'T I -- I'M AHEAD OF OURSELVES HERE,  
11:36AM 3 BUT WE'LL PASS ON THE ALLEGED VIOLATIONS REGULATIONS, WHICH IS  
11:36AM 4 YOUR NUMBER 28, WHICH WAS HOLMES 28, AND I'LL LET YOU WORDSMITH  
11:36AM 5 A SENTENCE OR TWO AND MEET AND CONFER WITH MS. VOLKAR IF YOU  
11:36AM 6 WOULD LIKE TO SEE IF YOUR ADDITIONS WOULD BE ACCEPTABLE IN THAT  
11:36AM 7 INSTRUCTION.

11:36AM 8 BUT I DON'T THINK IT'S APPROPRIATE TO GIVE THEM IN THE  
11:36AM 9 ACTUAL INSTRUCTION, SO -- FOR THE REASONS I'VE SAID.

11:36AM 10 MS. WALSH: THANK YOU, YOUR HONOR.

11:36AM 11 MS. VOLKAR: YOUR HONOR, BEFORE WE MOVE OFF OF THE  
11:36AM 12 FIRST PAGE OF THE WIRE FRAUD, THE GOVERNMENT HAS A REQUEST.

11:37AM 13 THE COURT: YES.

11:37AM 14 MS. VOLKAR: FIRST, JUST TO CLARIFY FOR THE RECORD,  
11:37AM 15 I'M LOOKING AT DOCUMENT 4 -- ECF 1476 AT 17, AND MR. BALWANI  
11:37AM 16 ALSO PROPOSED IN THE FIRST LINE THE CHANGES TO THE COUNTS THREE  
11:37AM 17 THROUGH TWELVE.

11:37AM 18 THE GOVERNMENT DOES NOT OBJECT AND AGREES WITH THAT. THAT  
11:37AM 19 WAS PROBABLY CLEAR, BUT I WANTED TO BE EXTRA CLEAR.

11:37AM 20 SIMILARLY ON LINE 19, THE SAME CHANGE IS MADE.

11:37AM 21 WHAT THE GOVERNMENT -- I HAVE NOT HEARD FROM THE DEFENSE,  
11:37AM 22 FROM MR. BALWANI HIS POSITION ON THE GOVERNMENT REQUEST FOR THE  
11:37AM 23 INVESTOR COUNTS TO ADD THE NAME OF THE INVESTOR IN A  
11:37AM 24 PARENTHETICAL FOLLOWING IT.

11:37AM 25 AND I DO APOLOGIZE TO MOVE US OFF OUR CORE DOCUMENT, BUT

11:37AM 1 IN ECF 1211 AT PAGE 38, WHICH WE SUBMITTED BACK IN DECEMBER, WE  
11:37AM 2 MADE THAT OFFER. THE HOLMES DEFENSE TEAM OBJECTED.

11:38AM 3 I WOULD JUST LIKE TO KNOW THIS DEFENDANT'S POSITION. I  
11:38AM 4 THINK IT HELPS THE JURY.

11:38AM 5 THE COURT: WE DID HAVE THAT DISCUSSION, AND I -- MY  
11:38AM 6 RECOLLECTION IS THAT I THOUGHT IT WOULD BE HELPFUL ALSO.

11:38AM 7 WHAT ARE YOUR THOUGHTS, MS. WALSH?

11:38AM 8 MS. WALSH: SO MY THOUGHTS ARE IN LINE WITH  
11:38AM 9 MS. SAHARIA'S ARGUMENTS THAT SHE MADE TO THE COURT AND  
11:38AM 10 ULTIMATELY THE COURT ACCEPTED, WHICH IS THAT THE INVESTOR'S  
11:38AM 11 NAMES ARE NOT IN THE INDICTMENT.

11:38AM 12 AND FOR THE COURT TO THEN INCORPORATE THOSE NAMES, WHICH  
11:38AM 13 CAME INTO EVIDENCE THROUGH THE TRIAL, INTO THE JURY  
11:38AM 14 INSTRUCTIONS HELPS THE GOVERNMENT TO SOME EXTENT CONNECT THE  
11:38AM 15 DOTS FOR THE JURY THROUGH THE INSTRUCTIONS.

11:38AM 16 AND IT SEEMED TO WORK FINE IN THE HOLMES TRIAL. I THINK  
11:38AM 17 THAT --

11:38AM 18 THE COURT: FINE FOR THE GOVERNMENT.

11:38AM 19 MS. WALSH: WELL, THEY USED A CHART AND IT DID NOT  
11:38AM 20 SEEM UNCLEAR TO THE JURY, SO THAT'S OUR POSITION.

11:38AM 21 THE COURT: OKAY. WELL, UNDERSTOOD.

11:39AM 22 AND WE HAD THIS ARGUMENT, THIS DISCUSSION WITH THE HOLMES  
11:39AM 23 TEAM, AND I FELT IT WOULD GIVE SOME CLARITY, BUT THE  
11:39AM 24 GOVERNMENT -- AND I ULTIMATELY RULED AS I DID.

11:39AM 25 THE GOVERNMENT, AS YOU POINT OUT, WAS ABLE IN CLOSING

11:39AM 1 ARGUMENT TO MAKE THEIR CHART AND CONNECT THE DOTS, IF YOU WILL.

11:39AM 2 ALL RIGHT. SO I'LL GIVE THAT SAME INSTRUCTION IN THAT

11:39AM 3 REGARD WITHOUT LISTING THE SPECIFIC VICTIMS, MS. VOLKAR.

11:39AM 4 MS. VOLKAR: UNDERSTOOD. THANK YOU, YOUR HONOR.

11:39AM 5 NOW I BELIEVE WE'RE ON THE SECOND PAGE OF THE WIRE FRAUD

11:39AM 6 INSTRUCTION.

11:39AM 7 THE COURT: YES.

11:39AM 8 MS. VOLKAR: AND THE GOVERNMENT'S NEXT, I GUESS,

11:39AM 9 LEAST REQUEST FOR DISCUSSION IS 1476, PAGE 18, BOTTOM OF THE

11:39AM 10 PAGE OF 17, THE FIRST TWO LINES ADD COUNT NINE, WHICH IN

11:39AM 11 ESSENCE WE AGREE WITH, BUT IT COPIES THE WORDING OF COUNT TEN

11:39AM 12 AND ELEVEN, AND THE ONLY THING WE WANT TO POINT OUT IS THAT THE

11:40AM 13 INDICTMENT REFERENCES SPECIFICALLY A PHONE CALL, A TELEPHONE

11:40AM 14 CALL FROM PATIENT B.B. TO THERANOS REGARDING LABORATORY BLOOD

11:40AM 15 TEST RESULTS, AND WE WOULD JUST REQUEST THAT THAT LANGUAGE BE

11:40AM 16 ADDED IN.

11:40AM 17 THE COURT: ANY OBJECTION TO THAT?

11:40AM 18 MS. WALSH: NO, YOUR HONOR. AND I MEANT TO CATCH

11:40AM 19 THAT AND I DID NOT, BUT NO OBJECTION.

11:40AM 20 THE COURT: OKAY. THANK YOU. THANK YOU,

11:40AM 21 MS. VOLKAR.

11:40AM 22 MS. VOLKAR: THANK YOU.

11:40AM 23 THE COURT: ANYTHING FURTHER ON THIS PAGE?

11:40AM 24 MS. VOLKAR: YES. THE NEXT -- AND I DO THINK IT'S

11:40AM 25 THE LAST ADDITION MR. BALWANI SUGGESTS IS TO THE "KNOWINGLY,"

11:40AM 1 THE FIRST ELEMENT.

11:40AM 2 AND THE -- I'M SORRY, LINES 14 TO 16 IF THAT'S BENEFICIAL.

11:40AM 3 THE COURT: I SEE "KNOWINGLY" APPEARING ON LINE 12.

11:40AM 4 MS. VOLKAR: CORRECT, YOUR HONOR. THAT'S THE

11:40AM 5 ELEMENT.

11:40AM 6 AND THERE'S BLUE TEXT, A SENTENCE THAT STARTS, "TO FIND"

11:41AM 7 BETWEEN LINE 14 AND LINE 16 --

11:41AM 8 THE COURT: OKAY.

11:41AM 9 MS. VOLKAR: -- THAT I UNDERSTAND THAT MR. BALWANI

11:41AM 10 IS ASKING TO BE ADDED TO WHAT WAS AN ALREADY AUGMENTED

11:41AM 11 INSTRUCTION FROM THE MODEL GIVEN IN THE HOLMES CASE.

11:41AM 12 AND AS I'M SPEAKING, I'LL JUST ROLL INTO THE GOVERNMENT'S

11:41AM 13 OBJECTION MAY NOT SURPRISE THE COURT. I BELIEVE THIS IS

11:41AM 14 BASED -- PERHAPS I'M SPECULATING HERE. I BELIEVE THIS IS BASED

11:41AM 15 ON THE PHILLIPS CASE. I THINK WE'LL GET TO DISCUSSING THAT

11:41AM 16 FURTHER IN JUST A MOMENT.

11:41AM 17 ADDING THIS LANGUAGE HERE, I THINK IT WAS ALSO ASKED FOR

11:41AM 18 BY THE HOLMES TEAM.

11:41AM 19 IT'S UNNECESSARY. IT'S A FURTHER DESCRIPTION.

11:41AM 20 AND, I'M SORRY, I'M GETTING AHEAD OF MYSELF, WE'RE GOING

11:41AM 21 TO HAVE THE SAME ARGUMENT IN THE "KNOWINGLY DEFINED"

11:41AM 22 INSTRUCTION, AND THERE'S ALREADY A SENTENCE THAT COVERS THIS

11:41AM 23 CONCEPT.

11:41AM 24 I THINK IT'S UNNECESSARY VERBIAGE. IT'S A FURTHER

11:42AM 25 ADDITION FROM THE MODEL INSTRUCTION AND WHAT WAS GIVEN IN

11:42AM 1 HOLMES, AND THE GOVERNMENT WOULD OBJECT TO IT.

11:42AM 2 THE COURT: OKAY.

11:42AM 3 MS. WALSH: YES, YOUR HONOR.

11:42AM 4 I THINK THERE ARE TWO ISSUES. ONE MS. VOLKAR HAS  
11:42AM 5 IDENTIFIED, WHICH IS THE SUBSTANTIVE ONE, AND IT'S TRUE THAT  
11:42AM 6 THIS LANGUAGE IS BASED ON PHILLIPS.

11:42AM 7 AND WHEN WE GET TO THE "KNOWINGLY" INSTRUCTION, I'M GOING  
11:42AM 8 TO ASK MY COLLEAGUE, MS. SCHURICHT, TO COME UP AND ADDRESS  
11:42AM 9 THAT.

11:42AM 10 BUT THERE'S ALSO A FORM ISSUE THAT RELATES DIRECTLY TO  
11:42AM 11 THIS INSTRUCTION, AND WHAT I'M REFERRING TO IS THE OTHER TERMS  
11:42AM 12 IN THIS INSTRUCTION, NAMELY, SCHEME TO DEFRAUD ON PAGE 16,  
11:42AM 13 MATERIAL ON PAGE 18, INTENT TO DEFRAUD ON LINE 21, AND INTENT  
11:42AM 14 TO DECEIVE AND CHEAT ON LINE 22 ARE ALL DEFINED IN THIS  
11:42AM 15 INSTRUCTION AND EXPLAINED.

11:42AM 16 THE ONE ELEMENT OR TERM THAT IS NOT EXPLAINED IS  
11:43AM 17 KNOWINGLY.

11:43AM 18 AND SO I DO THINK IT'S APPROPRIATE TO EXPLAIN THAT TERM AS  
11:43AM 19 THE OTHERS ARE EXPLAINED WITH A SHORT SENTENCE CONTAINING THE  
11:43AM 20 ESSENCE OF WHAT KNOWINGLY MEANS.

11:43AM 21 MS. VOLKAR: YOUR HONOR, THE REASON THE OTHER THREE  
11:43AM 22 ELEMENTS ARE EXPLAINED -- I'D HAVE TO GLANCE BACK, BUT IT WAS  
11:43AM 23 NOT IN THE MODEL. THOSE WERE, AS FAR AS I CAN RECALL, ALL  
11:43AM 24 ADDITIONS THAT CAME ABOUT THROUGH DISCUSSIONS IN THE HOLMES  
11:43AM 25 CASE.

1 I WOULD SAY THAT PART OF THE REASON WHY THERE WAS NOT  
2 FURTHER EXPLANATION OF KNOWINGLY IS BECAUSE THERE IS AN  
3 ENTIRELY SEPARATE INSTRUCTION WHICH, IF I'M NOT MIXING MYSELF  
4 UP, IS EITHER NEXT OR SHORTLY AFTER THIS INSTRUCTION THAT GIVES  
5 SEVERAL MORE SENTENCES DESCRIBING WHAT KNOWINGLY REQUIRES.

6 AND ALTHOUGH I THINK THERE IS ONE ON INTENT TO DEFRAUD AS  
7 WELL, MY RECOLLECTION IS THAT THAT JUST REPEATS WHAT IS HERE.

8 AND WHERE I'M GOING WITH ALL OF THIS IS THAT WE'RE ALREADY  
9 IN A WORLD WHERE WE'VE FURTHER AUGMENTED WHAT THE MODEL  
10 INSTRUCTION SUGGESTS, AND I DON'T THINK THAT WE NEED TO AUGMENT  
11 IT FURTHER FOR THIS ELEMENT WHEN THERE'S ANOTHER INSTRUCTION  
12 THAT COVERS THIS TOPIC.

13 THE COURT: THAT'S -- THANK YOU.

14 THAT'S INSTRUCTION NUMBER 23 AT DOCUMENT 1206, "KNOWINGLY  
15 DEFINED."

16 THE COURT -- AGAIN, GETTING AHEAD OF OURSELVES -- I'M  
17 INCLINED TO GIVE THAT "KNOWINGLY" INSTRUCTION, OF COURSE,  
18 SUBSTITUTING MR. BALWANI FOR MS. HOLMES.

19 AND IT WOULD SEEM THAT THAT PROVIDES THE PROTECTION AND  
20 GUIDANCE THAT YOU'RE SEEKING, MS. WALSH.

21 AGAIN, I'M HAPPY TO MOVE THAT, IF YOU WANT TO SUGGEST TO  
22 MOVE THAT KNOWINGLY DEFINITION, TO A PLACE CLOSER TO THE  
23 INSTRUCTION. YOU KNOW, I'LL HEAR FROM YOU ON THAT.

24 BUT I DO THINK THAT THE "KNOWINGLY" INSTRUCTION, AS I'VE  
25 SAID, I WILL GIVE IT.

11:45AM 1 AND I WON'T GIVE -- I'LL DECLINE YOUR INVITATION TO GIVE  
11:45AM 2 THE KNOWINGLY IN THE INSTRUCTION AS YOU'VE PRESENTED IT, BUT I  
11:45AM 3 WILL -- I THINK IT'S APPROPRIATE TO INSTRUCT THE JURY AS TO  
11:45AM 4 WHAT KNOWINGLY IS. GIVING IT A SEPARATE INSTRUCTION ACTUALLY,  
11:45AM 5 I THINK, HIGHLIGHTS THAT ELEMENT FOR THE JURY, AS OPPOSED TO  
11:45AM 6 PUTTING IT IN THE MIDDLE OF THE ELEMENTS, AND IT SEEMS TO ME  
11:45AM 7 THAT GIVES IT SOME -- KNOWINGLY -- AN ELEVATED STATUS SUCH THAT  
11:45AM 8 THE JURY IS BETTER INFORMED ABOUT IT, AND IT APPLIES TO THE  
11:45AM 9 ACTS.

11:45AM 10 SO I'M NOT GOING TO GIVE IT, THE KNOWINGLY, AS YOU  
11:45AM 11 SUGGEST.

11:45AM 12 BUT I WILL GIVE THE "KNOWINGLY" INSTRUCTION SEPARATELY.  
11:45AM 13 IF YOU WANT TO SUGGEST A LOCATION FOR THAT THAT YOU THINK IS  
11:45AM 14 BETTER, I'LL CERTAINLY CONSIDER THAT WHEN WE PREPARE THE FINAL  
11:46AM 15 INSTRUCTIONS.

11:46AM 16 MS. WALSH: THANK YOU, YOUR HONOR.

11:46AM 17 THE COURT: YOU'RE WELCOME.

11:46AM 18 MS. VOLKAR: AND, YOUR HONOR, BEFORE WE MOVE ON FROM  
11:46AM 19 WIRE FRAUD, FOR THE SAME REASONS I ANTICIPATE I KNOW WHERE THE  
11:46AM 20 COURT WILL LAND, BUT LAST GO-ROUND, THE GOVERNMENT REQUESTED A  
11:46AM 21 LINE THAT IS -- AN ADDITION FROM THE MODEL THAT THE GOVERNMENT  
11:46AM 22 WAS UNSUCCESSFUL IN MOVING FOR LAST TIME AND PROBABLY WILL BE  
11:46AM 23 HERE, BUT FROM THE COMMENTARY THAT SAYS THAT THE JURORS DO NOT  
11:46AM 24 HAVE TO AGREE ON THE SPECIFIC MISREPRESENTATION, AND I'M GOING  
11:46AM 25 TO -- I HOPE I'M CLOSE ENOUGH TO IT, BUT SO LONG AS THEY FIND

11:46AM 1 THE DECEPTIVE SCHEME, AND WE DID SUGGEST THAT IN OUR FILING ECF  
11:46AM 2 1211 AT 39.

11:46AM 3 WE WILL JUST STAND ON OUR REQUEST THERE, AND WE UNDERSTAND  
11:46AM 4 THE COURT WILL DO AS IT DID IN THE HOLMES TRIAL AND NOT ADD  
11:46AM 5 THAT.

11:46AM 6 THE COURT: SHOULD I ADD THAT, MS. WALSH?

11:46AM 7 MS. WALSH: NO, YOUR HONOR. THANK YOU.

11:46AM 8 THE COURT: ALL RIGHT. THANK YOU.

11:46AM 9 I WILL GIVE THE INSTRUCTION AS GIVEN IN THE HOLMES CASE,  
11:47AM 10 BUT YOUR OBJECTION IS NOTED.

11:47AM 11 MS. VOLKAR: THANK YOU, YOUR HONOR.

11:47AM 12 THE COURT: ALL RIGHT. LET'S MOVE THEN, I THINK  
11:47AM 13 NEXT IS NUMBER 21 ON YOUR CHART, WHICH IS "INTENT TO DEFRAUD."  
11:47AM 14 AND I SEE NO FURTHER DISCUSSION NEEDED ON THAT.

11:47AM 15 MS. WALSH: CORRECT, YOUR HONOR.

11:47AM 16 MS. VOLKAR: THAT'S CORRECT, YOUR HONOR.

11:47AM 17 THE COURT: ALL RIGHT. THEN I'LL GIVE THE "INTENT  
11:47AM 18 TO DEFRAUD" AS GIVEN IN HOLMES, INSTRUCTION NUMBER 21 IN  
11:47AM 19 DOCUMENT 1206.

11:47AM 20 GOOD FAITH IS WHAT YOU HAVE NEXT, MS. WALSH, AND THIS IS  
11:47AM 21 THE HOLMES 22, INSTRUCTION NUMBER 22 IN DOCUMENT 1206.

11:48AM 22 LET ME JUST SAY I HAVE A QUESTION ABOUT THIS. AND LET ME  
11:48AM 23 SAY, IN THE HOLMES MATTER, MS. HOLMES TESTIFIED, AND THERE MAY  
11:48AM 24 HAVE BEEN TESTIMONY FROM HER THAT REFERENCED HER BELIEFS FROM  
11:48AM 25 WHICH A GOOD FAITH INSTRUCTION WOULD ARISE, AND I BELIEVE WE



11:48AM 1 HAD CONVERSATION ABOUT THAT.

11:48AM 2 WHAT IS THE BASIS FOR A GOOD FAITH INSTRUCTION HERE?

11:48AM 3 MS. WALSH: MANY EMAILS AND TESTIMONY FROM OTHER  
11:48AM 4 WITNESSES ABOUT MR. BALWANI'S ACTIONS AND STATEMENTS THROUGHOUT  
11:48AM 5 THE COURSE OF HIS TENURE AT THERANOS.

11:48AM 6 I DON'T THINK IT'S A PREREQUISITE THAT A DEFENDANT HAS TO  
11:48AM 7 TESTIFY TO GET A GOOD FAITH INSTRUCTION.

11:48AM 8 THE COURT: RIGHT. NO, I'M NOT SUGGESTING THAT IT  
11:48AM 9 IS.

11:48AM 10 I'M JUST TRYING TO FIND OUT WHAT IS THE BASIS FOR IT, FOR  
11:48AM 11 THE INSTRUCTION.

11:49AM 12 MS. WALSH: YEAH, I THINK IT'S TESTIMONY FROM  
11:49AM 13 VARIOUS WITNESSES. IT'S NOT LIKE THEY LITERALLY SAID HE WAS  
11:49AM 14 ACTING IN GOOD FAITH.

11:49AM 15 BUT I RECALL TESTIMONY FROM MR. EDLIN WHEN MR. BALWANI WAS  
11:49AM 16 WORKING ON I.T. RELATED ISSUES WITH THE THERANOS DEVICES AND  
11:49AM 17 SENDING THEM TO AFGHANISTAN, THERE WERE EMAIL -- THERE WERE  
11:49AM 18 MANY, MANY EMAILS ABOUT THAT.

11:49AM 19 WE INTEND TO ARGUE THAT HE AT ALL TIMES WAS ACTING IN GOOD  
11:49AM 20 FAITH AND HE BELIEVED IN THE CAPABILITY OF THIS TECHNOLOGY. I  
11:49AM 21 THINK THAT'S AN APPROPRIATE ARGUMENT, AND IT'S AN ARGUMENT THAT  
11:49AM 22 NEEDS CORRESPONDING INSTRUCTIONS SO THAT THE JURORS UNDERSTAND  
11:49AM 23 WHAT THE LAW IS WHEN THEY'RE APPLYING THE LAW TO THE FACTS AND  
11:49AM 24 THINKING ABOUT THE EVIDENCE THAT CAME IN.

11:49AM 25 THE COURT: OKAY. IS THAT -- IT'S NOT DIRECT

11:49AM 1 EVIDENCE, BUT IT'S CIRCUMSTANTIAL EVIDENCE, OR IS IT BOTH?

11:49AM 2 MS. WALSH: WELL, NO WITNESS SAID "I BELIEVE

11:50AM 3 MR. BALWANI WAS ACTING IN GOOD FAITH," SO IT -- I THINK IT IS

11:50AM 4 CIRCUMSTANTIAL EVIDENCE. BUT.

11:50AM 5 THERE ARE A LOT OF CIRCUMSTANCES FROM WHICH WE WOULD ARGUE

11:50AM 6 THAT, AND ONE -- ANOTHER ONE COMES TO MIND, WHICH IS HIS

11:50AM 7 INVESTMENT IN THE COMPANY, THE LOAN TO THE COMPANY, ALL SHOWING

11:50AM 8 A GOOD FAITH BELIEF IN THE BONA FIDES OF THE ENTERPRISE.

11:50AM 9 THE COURT: THE ARGUMENT BEING, WHY ELSE WOULD

11:50AM 10 SOMEONE INVEST?

11:50AM 11 MS. WALSH: SURE. PUTTING \$10 MILLION OF HIS OWN

11:50AM 12 MONEY AT RISK SHOWS CONFIDENCE AND A GOOD FAITH BELIEF THAT

11:50AM 13 THIS IS A WORTHY COMPANY THAT HAS TECHNOLOGY HE BELIEVES IS

11:50AM 14 CAPABLE OF DOING WHAT, WHAT MS. HOLMES AND OTHERS SAYS IT COULD

11:50AM 15 DO.

11:50AM 16 THE COURT: OKAY.

11:50AM 17 MS. VOLKAR: YOUR HONOR IS PROBABLY REMEMBERING THE

11:51AM 18 HEATED DISCUSSION WE HAD ABOUT THIS IN THE LAST TRIAL.

11:51AM 19 THE GOVERNMENT, OF COURSE, OPPOSES A GOOD FAITH

11:51AM 20 INSTRUCTION. NINTH CIRCUIT CASE LAW IS CLEAR THAT WHEN

11:51AM 21 KNOWINGLY IS PROPERLY DEFINED, NO GOOD FAITH INSTRUCTION IS

11:51AM 22 REQUIRED. THAT IS THE LAW OF THE CIRCUIT.

11:51AM 23 THAT BEING SAID, WE ALSO HAD A HEALTHY AMOUNT OF DEBATE

11:51AM 24 ABOUT WHAT A GOOD FAITH BELIEF MUST BE, AND THE NINTH CIRCUIT

11:51AM 25 IS CRYSTAL CLEAR THAT IT MUST BE, AS WAS ULTIMATELY IN THE

11:51AM 1 COURT'S INSTRUCTION GIVEN, A GOOD FAITH BELIEF IN THE TRUTH OF  
11:51AM 2 THE SPECIFIC MISREPRESENTATIONS MADE.

11:51AM 3 SO IT'S THE GOVERNMENT'S POSITION THAT NO GOOD FAITH  
11:51AM 4 INSTRUCTION IS REQUIRED.

11:51AM 5 WE UNDERSTAND ONE WAS GIVEN IN THE HOLMES CASE. WE  
11:51AM 6 UNDERSTAND IF THE COURT CHOOSES TO GIVE IT HERE.

11:51AM 7 BUT WHAT WE WOULD STRENUOUSLY OBJECT TO IS ANY LANGUAGE  
11:51AM 8 THAT STRAYS FROM WHAT WE -- WHAT THE COURT LANDED ON IN THE  
11:52AM 9 HOLMES CASE BECAUSE IT IS VERY IMPORTANT THAT THE JURY KNOWS,  
11:52AM 10 GOOD FAITH IN WHAT?

11:52AM 11 AND THAT WAS ANOTHER SUBJECT OF HEALTHY DEBATE IN THE LAST  
11:52AM 12 TRIAL.

11:52AM 13 THE COURT: OKAY.

11:52AM 14 MS. WALSH: IF YOUR HONOR IS INCLINED NOT TO GIVE  
11:52AM 15 THE GOOD FAITH INSTRUCTION, I WOULD LIKE TO BE HEARD FURTHER ON  
11:52AM 16 IT.

11:52AM 17 THE COURT: NO. I JUST WANTED TO UNDERSTAND THE  
11:52AM 18 BASIS FOR IT IN A VACUUM.

11:52AM 19 THE BIG DISTINCTION IS MS. HOLMES TESTIFIED, AND SHE WAS  
11:52AM 20 ABLE TO GIVE HER TESTIMONY AS TO THE TECHNOLOGY, AS TO HER  
11:52AM 21 OPINIONS ON MANY THINGS FROM WHICH THE JURY -- THAT JURY  
11:52AM 22 COULD -- HAD DIRECT EVIDENCE FROM WHICH THEY COULD DRAW AN  
11:52AM 23 INFERENCE OF GOOD FAITH, OR NOT.

11:52AM 24 HERE, AS YOU'RE TELLING ME, MR. BALWANI MAY NOT TESTIFY,  
11:52AM 25 AND IF HE DOESN'T TESTIFY, WHAT I HEAR YOU SAYING IS THERE IS

11:52AM 1 CIRCUMSTANTIAL EVIDENCE FROM EMAILS AND OTHER -- THERE WAS  
11:53AM 2 TESTIMONY FROM SOME WITNESSES, INVESTORS, ABOUT REPRESENTATIONS  
11:53AM 3 THAT -- REGARDING FINANCES THAT MR. BALWANI MADE TO THEM.  
11:53AM 4 THAT WAS ADMITTED, AND IT SOUNDS LIKE THAT WOULD FORM THE  
11:53AM 5 BASIS OF AT LEAST AN ARGUMENT OF GOOD FAITH.  
11:53AM 6 MS. WALSH: YES, YOUR HONOR.  
11:53AM 7 THE COURT: ALL RIGHT. I'LL GIVE IT, NOTING THE  
11:53AM 8 GOVERNMENT'S OBJECTION.  
11:53AM 9 WE'LL CHANGE, OF COURSE, THE PARTIES.  
11:53AM 10 MS. VOLKAR: THANK YOU, YOUR HONOR.  
11:53AM 11 THE COURT: LET'S SEE. NEXT IS "KNOWINGLY."  
11:53AM 12 I THINK WE'VE TALKED ABOUT THAT.  
11:53AM 13 MS. VOLKAR: SORRY, YOUR HONOR. I ACTUALLY DO HAVE  
11:53AM 14 A FEW POINTS ON "KNOWINGLY."  
11:53AM 15 THE COURT: SURE.  
11:53AM 16 MS. VOLKAR: SO THIS WOULD BE, THIS WOULD BE AN  
11:53AM 17 EXAMPLE OF SOMETHING THAT THE PARTIES VIGOROUSLY DEBATED IN THE  
11:53AM 18 HOLMES TRIAL.  
11:53AM 19 THE GOVERNMENT IN HOLMES -- AND MR. BALWANI RECOMMENDS  
11:54AM 20 ALMOST THE EXACT SAME CHANGES THAT THE HOLMES TEAM DID, AND SO  
11:54AM 21 SOME OF THIS IS GOING TO BE REARGUMENT, BUT I ALSO UNDERSTAND  
11:54AM 22 THE COURT TO SAY THAT YOU'RE HAPPY TO HEAR IT.  
11:54AM 23 SO THE FIRST IS, AS IN THE HOLMES CASE, THE GOVERNMENT --  
11:54AM 24 SORRY.  
11:54AM 25 AS IN THE HOLMES CASE, HERE THE GOVERNMENT HAS CHOSE --

1 ELECTED NOT TO PURSUE AN OMISSIONS THEORY, AND THROUGHOUT THE  
2 INSTRUCTIONS IN THE HOLMES CASE THE REFERENCE TO THE OMISSIONS  
3 OF FACT WERE DROPPED WITH ONE EXCEPTION, THIS EXCEPTION ON THIS  
4 PAGE ON LINE 5. AND BY "THIS PAGE," ECF 1476 AT 20, LINE 5.

5 AND THE REASON FOR THAT -- AND THIS WAS A SOURCE, AGAIN,  
6 OF GREAT DEBATE TOWARDS THE END OF THE CHARGING CONFERENCE IS  
7 BECAUSE WHEN WE ARE TALKING ABOUT WHAT MAKES UP A PERSON'S  
8 KNOWLEDGE, WE'RE NOT TALKING ABOUT A LEGAL OMISSIONS OF FACT  
9 THEORY ANYMORE.

10 WE'RE TALKING ABOUT WHAT ARE THE SOURCES AND INPUTS AND  
11 WHAT ALL MAKES UP THE WORLD OF A PERSON'S KNOWLEDGE.

12 AND THAT CAN INCLUDE OMISSIONS.

13 AND AS BUT ONE EXAMPLE I CAN THINK OF, HE, MR. BALWANI, WE  
14 HAVE HEARD TESTIMONY SAT IN THE ROOM DURING INVESTOR  
15 PRESENTATIONS AND, WE WOULD ARGUE, DID NOT SPEAK UP WHEN  
16 MS. HOLMES MADE FALSE STATEMENTS TO INVESTORS.

17 BUT WE WOULD SAY IN SOME WAYS THAT'S AN OMISSION THAT HE  
18 WAS AWARE OF THAT, FOR EXAMPLE, SHE WASN'T ADDING X, Y, Z FACT,  
19 OR WASN'T CLARIFYING, OR WASN'T PROPERLY HEDGING AS MAYBE A  
20 PERSON SHOULD THINK.

21 I'M GETTING OUT OVER MY SKIS HERE WITH THE FACTS, AND I  
22 DON'T WANT TO GO TO WHAT MAY SOUND LIKE CLOSING ARGUMENT.

23 THE BASELINE POINT I'M TRYING TO SAY IS THAT WORDS, ACTS,  
24 AND OMISSIONS ARE ALL, AS WEIRD AS THIS MAY SOUND TO SAY,  
25 SOURCES, OR THE ABSENCE OF SOURCES, THAT COULD MAKE UP A

11:56AM 1 PERSON'S KNOWLEDGE.

11:56AM 2 AND THAT'S WHY THE COURT GAVE THAT INSTRUCTION IN HOLMES,  
11:56AM 3 AND THE GOVERNMENT SAYS THAT IT IS -- OR ARGUES THAT IT'S  
11:56AM 4 PROPER TO GIVE AGAIN HERE.

11:56AM 5 AND WHILE I HAVE THE MIKE, THE SECOND LINE IS THE --  
11:56AM 6 SORRY, LINES 7 THROUGH 8, THE SECOND ADDITION THAT MR. BALWANI  
11:56AM 7 SUGGESTS IS ALMOST IDENTICAL TO WHAT MS. HOLMES ASKED FOR.

11:56AM 8 BOTH OF THOSE TWO SENTENCES IN LINES 6 TO 8 DO NOT APPEAR  
11:56AM 9 IN THE MODEL INSTRUCTION.

11:56AM 10 THERE'S ALREADY AN ADDITION TO THE HOLMES INSTRUCTION, AND  
11:56AM 11 IT WAS BASED ON THE PHILLIPS CASE, AND IT WAS THE EXACT SAME  
11:56AM 12 ARGUMENT THAT WE HAD THE LAST GO-ROUND.

11:57AM 13 AND WHAT THE COURT ULTIMATELY FOUND WAS REALLY THE FIRST  
11:57AM 14 SENTENCE REALLY COVERS THE CONCEPT THAT'S JUST EMPHASIZED AND  
11:57AM 15 ADDED ON TO AND ENUMERATED IN THE FOLLOWING SENTENCE, THE LINES  
11:57AM 16 7 TO 8 THAT MR. BALWANI WANTS TO ADD, SO IT'S REDUNDANT.

11:57AM 17 AND SO THE GOVERNMENT WOULD ARGUE REALLY LINES 6 THROUGH 8  
11:57AM 18 ARE UNNECESSARY. THEY'RE NOT IN THE MODEL. THEY'RE ALREADY IN  
11:57AM 19 ADDITION.

11:57AM 20 IF THE COURT IS GOING TO ADD ANYTHING, WHAT THE COURT  
11:57AM 21 ADDED, THAT FIRST SENTENCE, LINES 6 TO 7, SUFFICES TO COVER THE  
11:57AM 22 PHILLIPS ARGUMENT THAT I EXPECT MY COLLEAGUE IS ABOUT TO MAKE.

11:57AM 23 THANK YOU.

11:57AM 24 THE COURT: THANK YOU.

11:57AM 25 MS. SCHURICHT: GOOD MORNING, YOUR HONOR.

11:57AM 1 SACHI SCHURICHT FOR MR. BALWANI. I'M JUST GOING TO BE SPEAKING  
11:57AM 2 ABOUT THIS INSTRUCTION.

11:57AM 3 I'LL TAKE THOSE TWO IN REVERSE ORDER, SO I'LL START WITH  
11:57AM 4 THE ADDITIONAL SENTENCE WE'VE PROPOSED ON LINES 7 AND 8.

11:57AM 5 IT SOUNDED EARLIER LIKE YOUR HONOR IS PLANNING AS OF NOW  
11:58AM 6 TO GIVE THE SAME INSTRUCTION, THE "KNOWINGLY" INSTRUCTION FROM  
11:58AM 7 THE HOLMES TRIAL, WHICH WOULD INCLUDE THAT FIRST SENTENCE DRAWN  
11:58AM 8 FROM U ON LINES 6 THROUGH 7.

11:58AM 9 AS MS. VOLKAR ACKNOWLEDGED, THE SECOND SENTENCE THAT WE'RE  
11:58AM 10 PROPOSING IS SIMPLY APPLYING THAT PRINCIPLE FROM PHILLIPS TO  
11:58AM 11 THE FACTS OF THIS CASE.

11:58AM 12 I DON'T THINK THERE'S MUCH HARM THAT COMES FROM THAT  
11:58AM 13 ADDITIONAL CLARIFICATION FOR THE JURY, AND I THINK IT MAKES  
11:58AM 14 SENSE TO MAKE CLEAR THAT THIS PRINCIPLE DOES APPLY TO  
11:58AM 15 MS. HOLMES'S KNOWLEDGE AND THE KNOWLEDGE OF THERANOS AGENTS OR  
11:58AM 16 EMPLOYEES GIVEN THE OUTSIZED ROLE THAT SHE HAS PLAYED IN THIS  
11:58AM 17 TRIAL IN A WAY THAT MR. BALWANI DIDN'T HAVE AS FIGURATIVELY AS  
11:58AM 18 LARGE OF A ROLE IN HER TRIAL.

11:58AM 19 AS MS. WALSH MENTIONED EARLIER TODAY, THERE'S EVIDENCE  
11:58AM 20 THAT HAS COME IN HERE OF INTERACTIONS THAT MS. HOLMES HAD WITH  
11:58AM 21 INVESTORS AS FAR BACK AS 2006, LONG BEFORE MR. BALWANI WAS EVEN  
11:58AM 22 INVOLVED IN THERANOS.

11:59AM 23 AND THERE IS A RISK, I THINK, THAT THE JURY MAY THINK THAT  
11:59AM 24 THOSE INTERACTIONS AND DECISIONS SHE MADE AT THAT TIME AND  
11:59AM 25 WHATEVER INFORMED THOSE DECISIONS AND INTERACTIONS COULD BE

11:59AM 1 IMPUTED TO HIM ABSENT AN INDEPENDENT FINDING THAT HE HAD  
11:59AM 2 PERSONAL KNOWLEDGE.

11:59AM 3 SO WE'RE SIMPLY ASKING TO APPLY THIS PRINCIPLE OF PHILLIPS  
11:59AM 4 TO THE FACTS HERE TO MAKE IT EXTRA CLEAR FOR THE JURY.

11:59AM 5 THE COURT: THANK YOU.

11:59AM 6 DOES THE FIRST SENTENCE INSTRUCT THE -- INFORM THE JURY OF  
11:59AM 7 THAT? THEY HAVE TO FIND THAT MR. BALWANI ACTED KNOWINGLY.  
11:59AM 8 "YOU MUST FIND THAT HE HIMSELF HAD KNOWLEDGE OF THE FACT AT  
11:59AM 9 ISSUE."

11:59AM 10 AND THAT, THAT DOESN'T PRECLUDE YOU OR YOUR COLLEAGUES  
11:59AM 11 FROM ARGUING THAT THEY CAN'T, THEY CAN'T RELY ON THE FACT THAT  
11:59AM 12 ANYONE ELSE HAD KNOWLEDGE, ONLY, ONLY -- IT'S ONLY AS TO HIM.

11:59AM 13 THIS IS THE SAME CONVERSATION THAT I HAD -- I DON'T THINK  
11:59AM 14 YOU WERE HERE DURING THE HOLMES DISCUSSION, BUT I RECALL IT IN  
12:00PM 15 THAT -- WHEN I SAID I WAS GOING TO GIVE "KNOWINGLY," I INTENDED  
12:00PM 16 TO GIVE, AND DO INTEND TO GIVE, THE FIRST SENTENCE, LINES 6 AND  
12:00PM 17 7 AS YOU REFERENCE IT, BECAUSE I DO THINK THAT FULFILLS THE  
12:00PM 18 PHILLIPS OBLIGATION IN INFORMING THE JURY THAT THEY MUST, THEY  
12:00PM 19 MUST, IF THEY'RE GOING TO FIND THAT THERE WAS A KNOWINGLY  
12:00PM 20 ACTION, ACT BY MR. BALWANI, THEY MUST FIND THAT HE HIMSELF HAD  
12:00PM 21 KNOWLEDGE OF THE FACT AT ISSUE.

12:00PM 22 AND THAT SEEMS TO BE THE DIRECTIVE THAT THE PHILLIPS CASE  
12:00PM 23 TELLS US.

12:00PM 24 MS. SCHURICHT: YOUR HONOR, I AGREE THAT THAT  
12:00PM 25 ENCAPSULATES PHILLIPS AND IS AN IMPORTANT PIECE TO INCLUDE



12:00PM 1 HERE. THE SECOND SENTENCE IS CERTAINLY NOT MEANT TO LIMIT -- I  
12:00PM 2 AGREE THAT WE WOULD NOT BE LIMITED IN THE ARGUMENTS THAT WE CAN  
12:00PM 3 MAKE FROM THAT FIRST SENTENCE. I JUST THINK THAT THERE'S  
12:00PM 4 REALLY NO REASON TO NOT PROVIDE FURTHER CLARITY FOR THE JURY.

12:00PM 5 THE COURT: OKAY.

12:01PM 6 MS. SCHURICHT: AND I'LL JUST POINT TO ONE  
12:01PM 7 PARTICULAR PIECE OF EVIDENCE THAT I THINK ILLUSTRATES THE  
12:01PM 8 CONCERN HERE.

12:01PM 9 SO WE HAVE DECISIONS, ACTIONS, THAT MS. HOLMES TOOK LONG  
12:01PM 10 BEFORE MR. BALWANI HAD JOINED THERANOS. THERE ARE, FOR  
12:01PM 11 INSTANCE, TEXT MESSAGES THAT HAVE BEEN ADMITTED INTO EVIDENCE  
12:01PM 12 HERE, INCLUDING ONE THAT I FRANKLY WOULD NOT BE SURPRISED IF WE  
12:01PM 13 HEAR IN THE CLOSING ARGUMENTS, WHERE MR. BALWANI SAYS TO  
12:01PM 14 MS. HOLMES, "I AM RESPONSIBLE FOR EVERYTHING AT THERANOS. ALL  
12:01PM 15 HAVE BEEN MY DECISIONS, TOO."

12:01PM 16 SO I THINK WHEN YOU PAIR THE EVIDENCE OF WHAT MS. HOLMES  
12:01PM 17 DID INDEPENDENTLY OF HIM WITH THE COMMUNICATION LIKE THAT,  
12:01PM 18 THERE IS A PARTICULARLY SEVERE RISK THAT THE JURY MAY THINK,  
12:01PM 19 OH, MR. BALWANI HAS ADOPTED ALL OF HER DECISIONS, EVERYTHING  
12:01PM 20 THAT INFORMED THOSE DECISIONS, HER KNOWLEDGE EVEN AT AN EARLIER  
12:01PM 21 TIME.

12:01PM 22 AND SO IT'S BECAUSE OF THE PARTICULAR EVIDENCE THAT WE'RE  
12:01PM 23 PRESENTED WITH HERE THAT WE THINK THE ADDITIONAL CLARIFICATION  
12:02PM 24 SPECIFYING MS. HOLMES IN PARTICULAR IN THIS SECOND SENTENCE  
12:02PM 25 WOULD BE HELPFUL TO THE JURY.

12:02PM 1 THE COURT: OKAY. THANK YOU.

12:02PM 2 MS. VOLKAR.

12:02PM 3 MS. VOLKAR: YOUR HONOR, I THINK THE COURT -- WELL,  
12:02PM 4 TWO THINGS.

12:02PM 5 ONE, THE GOVERNMENT INCORPORATES ITS ARGUMENTS FROM LAST  
12:02PM 6 TIME THAT PHILLIPS DOES NOT ACTUALLY REQUIRE THE INSTRUCTION.  
12:02PM 7 THE GOVERNMENT UNDERSTANDS THE COURT -- WHERE WE ARE AND THAT  
12:02PM 8 THE COURT PLANS TO GIVE, AS IT DID IN HOLMES, THAT FIRST LINE.

12:02PM 9 AND KNOWING THAT THAT'S WHERE WE ARE, THE SECOND LINE IS  
12:02PM 10 REDUNDANT AND IS REALLY JUST A RESTATEMENT OF THE FIRST LINE AS  
12:02PM 11 YOUR HONOR POINTED OUT, AND NOTHING PRECLUDES THE DEFENDANT  
12:02PM 12 FROM ARGUING IN CLOSING ARGUMENT EXACTLY THAT FROM THAT LINE.

12:02PM 13 AND GOING TO THE EXAMPLE THAT MY COLLEAGUE JUST GAVE, "ALL  
12:02PM 14 HAVE BEEN MY DECISIONS," THAT'S NOT NECESSARILY SAYING "I KNOW  
12:02PM 15 EVERYTHING YOU KNOW ABOUT THE COMPANY."

12:02PM 16 SO I GUESS I'M NOT SEEING THE DIRECT CONNECTION THERE OF  
12:03PM 17 ONE IS -- MAYBE I'M GETTING TOO HUNG UP ON ONE PIECE OF  
12:03PM 18 EVIDENCE. I KNOW THAT MS. SCHURICHT SAID SHE HAD MULTIPLE  
12:03PM 19 EXAMPLES, BUT IT'S NOT SAYING THAT "I KNOW EVERYTHING THAT YOU  
12:03PM 20 KNOW." WE DON'T HAVE A STATEMENT LIKE THAT.

12:03PM 21 SO I DON'T THINK WE NEED THESE ADDITIONAL GUARDRAILS WHEN  
12:03PM 22 WE ALREADY HAVE AN ENHANCED, WHAT I WILL CALL AN ENHANCED  
12:03PM 23 GUARDRAIL ABOVE AND BEYOND WHAT THE MODEL SUGGESTS IS  
12:03PM 24 APPROPRIATE.

12:03PM 25 WE HAVE THE DEFINITION OF KNOWINGLY FOLLOWED BY A SPECIFIC

12:03PM 1 STATEMENT THAT IT MUST BE BASED ON MR. BALWANI'S KNOWLEDGE THAT  
12:03PM 2 HE HIMSELF HAD.

12:03PM 3 I THINK THAT'S SUFFICIENT AND NOTHING MORE IS REQUIRED.

12:03PM 4 THE COURT: OKAY. THANK YOU.

12:03PM 5 MS. SCHURICHT: I HAVE NOTHING MORE ON THE PHILLIPS  
12:03PM 6 ISSUE.

12:03PM 7 I'LL JUST BRIEFLY ADDRESS THE FIRST POINT THAT MS. VOLKAR  
12:03PM 8 MADE --

12:03PM 9 THE COURT: YES.

12:03PM 10 MS. SCHURICHT: -- ON LINE 5 ABOUT THE REFERENCE TO  
12:03PM 11 OMISSIONS AND THE LIST OF FACTORS THAT THE JURY CAN CONSIDER  
12:03PM 12 FOR DECIDING WHETHER MR. BALWANI ACTED KNOWINGLY.

12:04PM 13 SO THIS MENTAL STATE KNOWINGLY, IT QUALIFIES IN THE WIRE  
12:04PM 14 FRAUD INSTRUCTION, "WHETHER MR. BALWANI KNOWINGLY PARTICIPATED  
12:04PM 15 IN, DEvised OR INTENDED TO DEVISE A SCHEME OR PLAN TO DEFRAUD."

12:04PM 16 AND SO MS. VOLKAR GAVE AN EXAMPLE OF MS. HOLMES BEING IN A  
12:04PM 17 ROOM WITH MR. BALWANI AND OMITTING CERTAIN THINGS IN  
12:04PM 18 CONVERSATIONS WITH I BELIEVE IT WAS INVESTORS, AND MR. BALWANI  
12:04PM 19 STANDING BY AND ALLOWING THOSE OMISSIONS TO HAPPEN.

12:04PM 20 THAT SOUNDS TO ME LIKE AN OMISSIONS THEORY OF FRAUD.

12:04PM 21 BUT WE KNOW THAT A FAILURE TO SPEAK IS NOT A PROPER BASIS  
12:04PM 22 FOR AN OMISSIONS THEORY WHEN THERE IS NOT EVIDENCE OF THE DUTY  
12:04PM 23 TO DISCLOSE.

12:04PM 24 AND SO I WORRY ABOUT THAT EXAMPLE THAT HAS BEEN GIVEN, AND  
12:04PM 25 I THINK IT HIGHLIGHTS THE RISK OF INCLUDING THOSE REFERENCES TO

12:04PM 1 OMISSIONS HERE.

12:04PM 2 I DON'T DISPUTE THAT THE GOVERNMENT CAN ARGUE -- I DON'T  
12:05PM 3 THINK THAT EXAMPLE QUITE WORKS, AND NOTHING COMES TO MY MIND.

12:05PM 4 AND I DON'T DISPUTE THAT THEY COULD ARGUE THAT AN OMISSION  
12:05PM 5 COULD INFORM MR. BALWANI'S STATE OF MIND.

12:05PM 6 I JUST THINK THAT INCLUDING A REFERENCE TO OMISSION IN  
12:05PM 7 THIS INSTRUCTION GIVES RISE TO A RISK THAT THE JURY MIGHT THINK  
12:05PM 8 ABOUT OMISSIONS MORE BROADLY IN THE SCHEME TO DEFRAUD IN  
12:05PM 9 DECIDING WHETHER OR NOT MR. BALWANI IS GUILTY OF JOINING AND  
12:05PM 10 COMMITTING A DECEPTIVE SCHEME.

12:05PM 11 AND I'LL JUST POINT OUT AS WELL THAT IF YOU CONTINUE  
12:05PM 12 LOOKING AT THIS SENTENCE, IT SAYS, "YOU MAY CONSIDER EVIDENCE  
12:05PM 13 OF MR. BALWANI'S WORDS, ACTS OR OMISSIONS, ALONG WITH ALL OF  
12:05PM 14 THE OTHER EVIDENCE, IN DECIDING WHETHER HE ACTED KNOWINGLY."

12:05PM 15 SO THERE'S ALREADY A CATCH-ALL PHRASE THERE. AND SO I  
12:05PM 16 DON'T THINK, BY REMOVING THE REFERENCE TO OMISSIONS HERE, THAT  
12:05PM 17 WE'RE NECESSARILY LIMITING WHAT THE GOVERNMENT CAN ARGUE. I  
12:05PM 18 THINK WE'RE JUST AVOIDING A RISK OF CONFUSION HERE.

12:06PM 19 THE COURT: OKAY. WELL, THANK YOU. THAT WAS  
12:06PM 20 SOMETHING THAT I WAS GOING TO ASK YOU ABOUT.

12:06PM 21 IF OMISSIONS IS DELETED, AS YOU ARE REQUESTING, THEN WHAT  
12:06PM 22 I HEAR YOU SAYING IS THAT THE GOVERNMENT WOULD NOT BE PRECLUDED  
12:06PM 23 FROM RAISING THE HYPOTHETICAL THAT SHE DID, HE SAT IN A ROOM,  
12:06PM 24 HE HEARD NUMBERS THAT HE KNEW WERE NOT ACCURATE, AND HE DIDN'T  
12:06PM 25 INFORM, HE DIDN'T DO ANYTHING. THAT'S AN ACT, I SUPPOSE, THAT

12:06PM 1 YOU'RE TELLING ME THAT THEY COULD COMMENT ON.

12:06PM 2 MS. SCHURICHT: I THINK IT COULD -- IT DEPENDS ON  
12:06PM 3 HOW THE ARGUMENT IS MADE. I THINK IF IT IS SPEAKING SOLELY TO  
12:06PM 4 HIS STATE OF MIND, YES, THAT WOULD BE PERMISSIBLE.

12:06PM 5 THERE'S JUST A DANGER OF IT BLEEDING INTO AN OMISSIONS  
12:06PM 6 THEORY OF FRAUD, WHICH IT SOUNDS LIKE THE GOVERNMENT IS NOT  
12:06PM 7 PURSUING.

12:06PM 8 THE COURT: WELL, IF I INSTRUCT THEM THAT THEY MAY  
12:06PM 9 NOT, THEY MAY NOT ARGUE AN OMISSIONS FRAUD THEORY, WOULD THAT  
12:07PM 10 GIVE YOU SOME SOLACE?

12:07PM 11 MS. SCHURICHT: CERTAINLY WE WOULD WELCOME THAT,  
12:07PM 12 YOUR HONOR.

12:07PM 13 MS. VOLKAR: YOUR HONOR, THE GOVERNMENT HAS -- WELL,  
12:07PM 14 ONE, I THINK MY COLLEAGUE HAS POINTED OUT WHY IT'S GOOD THAT  
12:07PM 15 I'M NOT GIVING THE CLOSING ARGUMENT.

12:07PM 16 BUT I WILL ALSO SAY THAT THE GOVERNMENT HAS DECIDED, AS IT  
12:07PM 17 DID IN THE HOLMES CASE -- OF COURSE, IT WAS NOT REQUIRED TO DO  
12:07PM 18 SO -- BUT THE GOVERNMENT HAS DECIDED AND ELECTED NOT TO PURSUE  
12:07PM 19 AN OMISSIONS THEORY, AND FOR THAT REASON IS WILLING TO DELETE  
12:07PM 20 IT FROM ALL OF THE PORTIONS OF THE JURY INSTRUCTIONS THAT IT  
12:07PM 21 PROFFERS, AS IT DID IN HOLMES.

12:07PM 22 AND I WANT TO GIVE AN EXAMPLE FROM THE MODEL. AND I'M  
12:07PM 23 TRYING TO GO OFF OF MY MEMORY OF WHAT WE ARGUED ABOUT THIS THE  
12:07PM 24 LAST TIME, BUT THE SENTENCE BEFORE IN THE MODEL READS, "THE  
12:07PM 25 GOVERNMENT IS NOT REQUIRED TO PROVE THAT THE DEFENDANT KNEW

12:07PM 1 THAT HIS ACTS OR OMISSIONS WERE UNLAWFUL."

12:08PM 2 AND THAT "OR OMISSIONS" WAS STRUCK WHEN WE ARGUED ABOUT  
12:08PM 3 THIS THE LAST GO-ROUND BECAUSE IT WAS TIED AND CONNECTED WITH  
12:08PM 4 ACTS, AND THAT GETS CLOSER TO THE OMISSIONS THEORY OF FRAUD  
12:08PM 5 THAT MY COLLEAGUE IS CONCERNED ABOUT.

12:08PM 6 AS WE ARGUED LAST TIME, THE SECOND SENTENCE, THE ONE THAT  
12:08PM 7 WE'RE CURRENTLY DEBATING -- AND IF YOU'RE LOOKING AT 1476, IT'S  
12:08PM 8 THE ONLY ONE YOU SEE -- BUT IT'S JUST WHAT GOES INTO THE MIX TO  
12:08PM 9 MAKE UP A PERSON'S KNOWLEDGE.

12:08PM 10 SO I PUT MY EXAMPLE TO THE SIDE IF THAT TROUBLES ANYONE,  
12:08PM 11 BUT I JUST WANT TO MAKE SURE THAT MY ARGUMENT IS CLEAR. WE ARE  
12:08PM 12 WILLING TO FOREGO THE OMISSIONS OF FACT THEORY OF FRAUD, BUT  
12:08PM 13 THAT DOES NOT MEAN IT IS NOT A TYPE OF SOURCE THAT COULD ADD TO  
12:08PM 14 A PERSON'S KNOWLEDGE, AND THAT'S WHY THE COURT INCLUDED IT IN  
12:08PM 15 THE HOLMES CASE, AND WE THINK IT'S APPROPRIATE TO DO SO HERE  
12:08PM 16 AGAIN.

12:08PM 17 THE COURT: THANK YOU FOR THAT.

12:08PM 18 AND I DO RECALL THAT'S WHY THE COURT STRUCK IT FROM THE  
12:08PM 19 ACTS. I FELT THAT WAS TOO CONTIGUOUS TO GIVE THE JURY PERHAPS  
12:09PM 20 SOME GROUNDS TO SPECULATE, AGAIN, ON AN OMISSIONS THEORY WHEN  
12:09PM 21 THE GOVERNMENT SAID IT WAS NOT PURSUING THAT.

12:09PM 22 THE OMISSIONS AS IT STOOD AND AS IT WAS GIVEN IN THE  
12:09PM 23 HOLMES CASE, HOWEVER, WENT TO SPECIFIC CONDUCT OF THE PARTY AND  
12:09PM 24 WHETHER OR NOT THE JURY COULD CONSIDER THE WORDS, ACTS, OR  
12:09PM 25 OMISSIONS.

1 NOW, IN MS. HOLMES'S CASE, THE OMISSIONS, MAYBE THAT WAS A  
2 LITTLE STRONGER BECAUSE SHE HAD AN OPPORTUNITY TO DO CERTAIN  
3 THINGS THAT PERHAPS MR. BALWANI DIDN'T HAVE. PERHAPS THE  
4 OMISSIONS IN HER CASE WERE ARGUABLY GREATER, IF THERE WERE ANY,  
5 OR CONDUCT REGARDING OMISSIONS MIGHT BE GREATER.

6 BUT I SEE THAT DISTINCTION, AND I THINK YOU DO TOO.

7 MS. SCHURICHT: I DO SEE THE DISTINCTION THAT  
8 MS. VOLKAR IS DRAWING.

9 BUT MY POINT IS SIMPLY THAT I THINK THIS REMAINING  
10 REFERENCE TO OMISSIONS JUST PRESENTS A DANGER THAT THE JURY MAY  
11 SPECULATE IN A WAY THAT WOULD BE IMPROPER GIVEN THE REMOVAL OF  
12 OMISSIONS ELSEWHERE IN THESE INSTRUCTIONS, AND I DON'T THINK  
13 ANYTHING IS LOST IN REMOVING IT WHEN THERE IS A CATCH-ALL  
14 PHRASE THAT FOLLOWS IMMEDIATELY AFTER.

15 THE COURT: SO IF IT IS REMOVED, THEN WHAT IS YOUR  
16 OPINION ON WHETHER OR NOT THE GOVERNMENT COULD ARGUE OMISSIONS  
17 AS PART OF HIS ACTS? COULD THEY DO THAT?

18 MS. SCHURICHT: SO I WANT TO BE CAREFUL HERE. I  
19 THINK THEY CAN ARGUE OMISSIONS AS RELEVANT TO HIS STATE OF MIND  
20 IF IT WAS CLEARLY NOT PURSUING THE OMISSIONS OF FACT THEORY  
21 THAT MS. VOLKAR SAYS THE GOVERNMENT DOES NOT INTEND TO PURSUE.

22 SO IT IS A FINE LINE. I THINK THAT'S PRECISELY WHY IT  
23 SHOULD BE REMOVED FROM THIS INSTRUCTION.

24 BUT IT'S DIFFICULT FOR ME TO KIND OF CONTEMPLATE EVERY WAY  
25 THAT THE GOVERNMENT MIGHT TRY TO ARGUE OMISSIONS AS RELEVANT TO

12:11PM 1 MR. BALWANI'S KNOWLEDGE, WHICH I THINK WOULD BE PERMISSIBLE. I  
12:11PM 2 JUST WORRY ABOUT ENCOURAGING THE JURY TO SPECULATE BY  
12:11PM 3 REFERENCING IT HERE IN THE INSTRUCTION.

12:11PM 4 THE COURT: MS. VOLKAR.

12:11PM 5 MS. VOLKAR: I THINK AT LEAST MS. SCHURICHT AND I  
12:11PM 6 ARE BOTH ON THE SAME PAGE IN TERMS OF WHAT IS AND ISN'T IN  
12:11PM 7 BOUNDS, EVEN IF THIS WERE INCLUDED IN THE INSTRUCTIONS.

12:11PM 8 IT WAS INCLUDED IN HOLMES. THE COURT GOT TO SEE THE  
12:11PM 9 GOVERNMENT, I BELIEVE, FOLLOWING THE COURT'S INSTRUCTIONS. WE  
12:11PM 10 INTEND TO FOLLOW THE COURT'S INSTRUCTIONS HERE AS WELL.

12:11PM 11 WE DON'T THINK TAKING THAT WORD OUT, ESPECIALLY WHEN IT  
12:11PM 12 WAS GIVEN IN THE HOLMES INSTRUCTIONS, MOVES THE NEEDLE, AND WE  
12:11PM 13 DON'T INTEND TO TAKE FURTHER LIBERTIES IF IT REMAINS IN.

12:12PM 14 THE COURT: SO WHICH IS EASIER FOR THE JURY TO  
12:12PM 15 UNDERSTAND, LEAVING THE OMISSIONS IN, RECOGNIZING THAT THE  
12:12PM 16 GOVERNMENT WOULD BE LIMITED IN THEIR ARGUMENT ON THIS, NOT TO  
12:12PM 17 ARGUE AN OMISSIONS THEORY OF CULPABILITY, BUT RATHER LIMITED TO  
12:12PM 18 THE ACTS OF MR. BALWANI IN DETERMINING KNOWINGLY; OR TO STRIKE  
12:12PM 19 IT AND THEN RELY ON THE GOVERNMENT TO STILL ARGUE THAT, AND  
12:12PM 20 THEN TO ARGUE OMISSION AS TO ACTS, WORDS, WHEN CONSIDERING  
12:12PM 21 WHETHER OR NOT HE ACTED KNOWINGLY.

12:12PM 22 MS. SCHURICHT: THE DEFENSE PREFERS THE LATTER.

12:12PM 23 THE COURT: ALL RIGHT. THANK YOU.

12:12PM 24 ANYTHING FURTHER?

12:12PM 25 MS. VOLKAR: NO, YOUR HONOR.



12:12PM 1 THE COURT: I SEE THE FACTS ARE DIFFERENT AND THE  
12:12PM 2 PARTIES ARE DIFFERENT IN THIS CASE.

12:13PM 3 I'LL STRIKE OMISSIONS FROM THIS, BUT THAT'S NOT TO SAY  
12:13PM 4 THAT THE GOVERNMENT IS -- LET ME NOT USE A DOUBLE NEGATIVE.

12:13PM 5 THE GOVERNMENT WOULD BE PERMITTED TO ARGUE OMISSIONS IN  
12:13PM 6 REGARDS TO MR. BALWANI'S -- IN THEIR CONSIDERATION OF THE  
12:13PM 7 EVIDENCE OF MR. BALWANI'S WORDS OR ACTS, THAT COULD INCLUDE  
12:13PM 8 OMISSIONS.

12:13PM 9 I'M NOT GOING TO PUT IT IN THE INSTRUCTIONS, BUT THEY WILL  
12:13PM 10 BE PERMITTED TO ARGUE THAT IN REGARDS TO WHETHER OR NOT  
12:13PM 11 MR. BALWANI ACTED KNOWINGLY. THEY WILL BE ABLE TO ARGUE THAT.

12:13PM 12 THEY'RE NOT GOING TO BE ABLE TO ARGUE AN OMISSIONS THEORY  
12:13PM 13 FOR CULPABILITY, HOWEVER.

12:13PM 14 IS THAT CLEAR?

12:13PM 15 MS. SCHURICHT: THAT'S FINE.

12:13PM 16 THE COURT: IS THAT CLEAR?

12:13PM 17 MS. VOLKAR: YES, YOUR HONOR. I DIDN'T KNOW IF YOU  
12:13PM 18 WERE GOING TO MOVE NEXT TO THE --

12:13PM 19 THE COURT: I AM. I AM.

12:13PM 20 AND I'M GOING TO OTHERWISE GIVE JURY INSTRUCTION NUMBER 23  
12:14PM 21 AS GIVEN IN THE HOLMES CASE IN DOCUMENT 1206, WHICH DOES NOT  
12:14PM 22 INCLUDE THE LAST SENTENCE ON LINES 7 AND 8. I DON'T THINK  
12:14PM 23 THAT'S NECESSARY. I THINK THAT'S CUMULATIVE.

12:14PM 24 AND THAT DOESN'T PRECLUDE THE PARTIES FROM MAKING ANY  
12:14PM 25 ARGUMENT REGARDING THOSE CONCEPTS.

12:14PM 1 MS. SCHURICHT: UNDERSTOOD.

12:14PM 2 THE COURT: OKAY. THANK YOU.

12:14PM 3 MS. SCHURICHT: THANK YOU.

12:14PM 4 THE COURT: ANYTHING FURTHER ON KNOWINGLY?

12:14PM 5 MS. VOLKAR: NO, YOUR HONOR. THANK YOU.

12:14PM 6 THE COURT: LET'S SEE.

12:14PM 7 MS. VOLKAR: I'M HAPPY, IN CASE IT HELPS, I THINK

12:14PM 8 THE NEXT FEW ARE GOING TO GO QUICKER BECAUSE I THINK THE

12:14PM 9 PARTIES ARE LARGELY IN AGREEMENT.

12:14PM 10 THE COURT: OKAY. NEXT IS 24 ON THE CHART, "AIDING

12:14PM 11 AND ABETTING."

12:14PM 12 MS. VOLKAR: AND ACKNOWLEDGING THAT WE'RE ALL

12:15PM 13 STARTING FROM WHAT WAS GIVEN IN THE HOLMES CASE, THE ONLY EDITS

12:15PM 14 I SAW FOR MR. BALWANI WAS ACCOUNTING FOR COUNT NINE, AND THE

12:15PM 15 GOVERNMENT IS FINE WITH THAT.

12:15PM 16 SO I THINK THAT WAS THE ONLY DISCUSSION FOR NUMBER 24.

12:15PM 17 MS. WALSH: THAT'S CORRECT.

12:15PM 18 THE COURT: WITH THOSE CHANGES THEN, MS. VOLKAR,

12:15PM 19 YOU'LL PREPARE THAT.

12:15PM 20 MS. VOLKAR: YES. AND I UNDERSTAND THE SAME WILL BE

12:15PM 21 TRUE FOR 25.

12:15PM 22 THE COURT: THANK YOU.

12:15PM 23 MS. WALSH: CORRECT.

12:15PM 24 THE COURT: THANK YOU. WITH THOSE CHANGES THEN,

12:15PM 25 MS. VOLKAR.

12:15PM 1 MS. VOLKAR: YES, YOUR HONOR.

12:15PM 2 THE COURT: NEXT IS 26.

12:15PM 3 MS. WALSH: WITH REGARD TO 26, WE HAVE NO FURTHER  
12:15PM 4 ARGUMENT.

12:15PM 5 MS. VOLKAR: YOUR HONOR.

12:15PM 6 THE COURT: YES.

12:15PM 7 MS. VOLKAR: LAST GO-ROUND THE GOVERNMENT HAD AN  
12:16PM 8 ADDITIONAL SENTENCE THAT IT WANTED IN 26. IT WAS ULTIMATELY  
12:16PM 9 STRUCK. WE DON'T NEED TO SEEK TO RELITIGATE THAT HERE.

12:16PM 10 WE'RE FINE WITH THE INSTRUCTION THAT WAS GIVEN IN HOLMES,  
12:16PM 11 BUT WE WANTED TO PRESERVE THAT.

12:16PM 12 THE COURT: THANK YOU. I'LL GIVE THE INSTRUCTION  
12:16PM 13 THAT WAS GIVEN IN THE HOLMES CASE AS GIVEN.

12:16PM 14 THANK YOU, MS. VOLKAR.

12:16PM 15 IS 27, "SUCCESS OF THE WIRE FRAUD SCHEME," NEXT?

12:16PM 16 MS. VOLKAR: IT IS. AND I'M HAPPY TO REPORT, IN THE  
12:16PM 17 SAME VEIN, THE PARTIES I BELIEVE ALSO AGREE ON NUMBER 27.

12:16PM 18 MS. WALSH: CORRECT, YOUR HONOR.

12:16PM 19 THE COURT: ALL RIGHT. THANK YOU.

12:16PM 20 NEXT ON THE CHART IS 28, "VIOLATIONS, REGULATIONS." I  
12:16PM 21 TOLD YOU I INTEND TO GIVE THAT.

12:16PM 22 ANYTHING FURTHER ON THAT?

12:16PM 23 MS. WALSH: NO, YOUR HONOR, ONLY THAT WE MAY LOOK  
12:16PM 24 INTO PROPOSING TO MOVE THAT EARLIER.

12:16PM 25 THE COURT: SURE. OKAY.

12:16PM 1 MS. VOLKAR: YOUR HONOR, IT WOULD BE HELPFUL TO KNOW  
12:16PM 2 THE GOVERNMENT REITERATES ITS PRIOR OBJECTIONS TO NUMBER 28.

12:16PM 3 BUT EARLIER I THINK WE WERE DISCUSSING WHETHER OR NOT  
12:17PM 4 ADDITIONAL LANGUAGE WOULD BE ADDED TO 28.

12:17PM 5 IF 28 IS GOING TO REMAIN AS IT WAS GIVEN IN THE HOLMES  
12:17PM 6 CASE, THE GOVERNMENT IS HAPPY TO JUST REST ON ITS PRIOR  
12:17PM 7 OBJECTIONS AND NOTHING FURTHER.

12:17PM 8 BUT IF THERE'S GOING TO BE FURTHER WORDSMITHING, MAYBE  
12:17PM 9 THAT SHOULD JUST BE PART OF OUR MEET AND CONFER.

12:17PM 10 THE COURT: THAT'S WHAT MY INTENT WAS --

12:17PM 11 MS. WALSH: YES.

12:17PM 12 THE COURT: -- THAT YOU MEET AND CONFER ON THAT AND  
12:17PM 13 YOU SEE BOTH WHETHER OR NOT A SENTENCE OR TWO, WHATEVER, WOULD  
12:17PM 14 BE ADDED, AND THEN LOCATION.

12:17PM 15 MS. WALSH: YES, YOUR HONOR.

12:17PM 16 MS. VOLKAR: UNDERSTOOD. THANK YOU.

12:17PM 17 THE COURT: I WILL GIVE THE FINAL INSTRUCTIONS. I  
12:17PM 18 THINK THAT'S THE 7 SERIES. I DON'T THINK THERE'S ANY DISPUTE  
12:17PM 19 ABOUT THE 7 SERIES, THAT IS, THE CONCLUDING INSTRUCTIONS, "DUTY  
12:17PM 20 TO DELIBERATE."

12:17PM 21 MS. VOLKAR: ONE MOMENT, YOUR HONOR. I BELIEVE  
12:17PM 22 THAT'S RIGHT.

12:17PM 23 THE COURT: SURE.

12:18PM 24 (PAUSE IN PROCEEDINGS.)

12:18PM 25 MS. VOLKAR: YOUR HONOR, IT IS THE SAME WHERE THERE

1 WAS SOME TWEAKS THAT WERE MADE IN THE HOLMES FILED VERSION THAT  
2 ARE NOT CURRENTLY REFLECTED IN THE GOVERNMENT'S VERSION.

3 WE'RE HAPPY TO ADD THOSE GIVEN THE DISCUSSION THIS  
4 MORNING, BUT WE PRESERVE OUR PRIOR ARGUMENTS ABOUT THEM.

5 THE COURT: OKAY. THANK YOU.

6 SO WHAT I'LL DO THEN, MS. VOLKAR, AND I'LL ACCEPT YOUR  
7 INVITATION TO PREPARE A DRAFT THAT CAN BE SHARED, AND THEN  
8 WE'LL HAVE ANOTHER FINAL CHARGING DISCUSSION ABOUT THAT AT SOME  
9 POINT WHEN WE HAVE TIME.

10 BUT LET'S TALK ABOUT -- I BELIEVE THERE ARE TWO THAT ARE  
11 LISTED IN 1476 ON THE BOTTOM OF PAGE 3, BALWANI PROPOSED  
12 INSTRUCTIONS, AND ONE IS A "GOVERNMENT AGENCY WITNESS" AND THE  
13 OTHER IS THE "ADVERSE INFERENCE FOR MISSING EVIDENCE."

14 LET ME TAKE THAT LAST ONE FIRST, "ADVERSE INFERENCE FOR  
15 MISSING EVIDENCE." I HAVE THE PROPOSED.

16 IT SEEMS TO ME THIS MIGHT BE DEFERRED UNTIL AFTER  
17 MR. SONNIER'S TESTIMONY.

18 MS. WALSH: YES, YOUR HONOR, THAT'S FINE WITH THE  
19 DEFENSE. IF THAT'S THE COURT'S PREFERENCE, WE CAN DO THAT.

20 THE COURT: IT SEEMS IF I'M GOING TO GO THROUGH --  
21 AND I KNOW THE PARTIES REFERENCE LOUD HAWK AND SOME OTHER  
22 CASES, AND LOUD HAWK TALKS ABOUT A BALANCING, AND WHEN I LOOKED  
23 AT THIS, IF I -- I THINK IT APPROPRIATE TO LOOK AND BALANCE THE  
24 CONDUCT, THE FACTS, INCLUDING ANY PREJUDICE.

25 WE KNOW FROM OUR CONVERSATIONS AS TO WHAT THE STATE OF THE

1 EVIDENCE IS, OR THE FACTS ARE, I SHOULD SAY.

2 I'M NOT PREPARED TODAY, JUST BASED ON THAT DISCUSSION,  
3 WITHOUT HEARING THE TESTIMONY, TO MAKE A DECISION AS TO WHETHER  
4 OR NOT THIS INSTRUCTION SHOULD BE GIVEN EITHER AS PRESENTED OR  
5 MODIFIED WITH ADDITIONAL LANGUAGE BASED ON THE EVIDENCE.

6 AND THAT WOULD INCLUDE WHETHER OR NOT THE GOVERNMENT  
7 DECIDES, IF THIS WITNESS TESTIFIES, WHETHER OR NOT THE  
8 GOVERNMENT DECIDES TO ADD A REBUTTAL, BECAUSE THAT COULD CHANGE  
9 THE NATURE OF THE INSTRUCTIONS. THERE COULD BE ADDITIONS,  
10 DELETIONS BASED ON THAT.

11 AND MY SENSE IS THAT THE COURT SHOULD RECOGNIZE THE  
12 TOTALITY OF THE CIRCUMSTANCE, I SHOULD SAY THE TOTALITY OF THE  
13 EVIDENCE THAT IS PRESENTED TO THE JURY BEFORE IT DECIDES AND  
14 MAKES A FINAL DECISION ON WHETHER OR NOT THIS INSTRUCTION  
15 SHOULD BE GIVEN.

16 I'M HAPPY TO HEAR FROM YOU.

17 MS. WALSH: THAT MAKES SENSE TO THE DEFENSE,  
18 YOUR HONOR.

19 MS. VOLKAR: YOUR HONOR, I'M HAPPY TO DEFER.

20 IT WON'T SURPRISE THE COURT TO HEAR THAT THE GOVERNMENT  
21 STRENUOUSLY OBJECTS TO GIVING THIS INSTRUCTION AT ALL, AND IF  
22 IT WERE TO BE GIVEN, IT WOULD NEED TO BE SUBSTANTIALLY  
23 MODIFIED.

24 I WANT TO MAKE TWO POINTS ON THAT. ONE, THE MODEL  
25 INSTRUCTION THAT I ASSUME THIS IS BASED OFF OF, BUT IT IS

12:21PM 1 SOMEWHAT HARD TO RECOGNIZE, IS MODEL 3.19, WHICH HAS A  
12:21PM 2 DIFFERENT TITLE TO START WITH, LET ALONE SIGNIFICANTLY  
12:21PM 3 DIFFERENT LANGUAGE. "INTENTIONALLY" IS USED, NOT "NEGLIGENTLY"  
12:21PM 4 OR "RECKLESSLY."

12:21PM 5 THE COURT: RIGHT.

12:21PM 6 MS. VOLKAR: BUT MORE THAN THAT, I WANT TO MAKE SURE  
12:21PM 7 THE COURT IS AWARE AND HAS TIME TO PREPARE WHERE, AS DEFENDANT  
12:21PM 8 AND DEFENSE COUNSEL HAS ARGUED THE COURT'S PRIOR RULING ON THE  
12:21PM 9 MOTION TO SUPPRESS WAS IRRELEVANT WHEN WE WERE TALKING ABOUT  
12:21PM 10 MR. SONNIER, WE UNDERSTAND THE COURT'S ORDER.

12:21PM 11 THE COURT'S ANALYSIS IN THE MOTION TO SUPPRESS WAS  
12:21PM 12 ABSOLUTELY ON THE LOUD HAWK CASE, LINE OF CASES AND FACTORS,  
12:21PM 13 AND IT IS ABSOLUTELY RELEVANT TO THIS EXACT ISSUE.

12:21PM 14 SO I WOULD JUST INVITE THE COURT TO -- WE'RE GOING TO HAVE  
12:22PM 15 ECF 887 AND THE COURT'S INCORPORATION OF IT AT ECF 1326 AT OUR  
12:22PM 16 FINGERTIPS, AND SO AS NOT TO SURPRISE ANYBODY, I WANTED TO SAY  
12:22PM 17 THAT, AT THIS MOMENT IN TIME, WE THINK THOSE ARE HIGHLY  
12:22PM 18 RELEVANT TO THE COURT'S ULTIMATE BALANCING.

12:22PM 19 THANK YOU.

12:22PM 20 THE COURT: ALL RIGHT. THANK YOU.

12:22PM 21 MS. WALSH: NOTHING FURTHER FROM THE DEFENSE.

12:22PM 22 THE COURT: OKAY.

12:22PM 23 THEN "AGENCY WITNESS."

12:22PM 24 MS. WALSH.

12:22PM 25 MS. WALSH: YES, YOUR HONOR. WE PROPOSED THIS NEW

12:22PM 1 INSTRUCTION BECAUSE MS. BENNETT TESTIFIED, WHO WORKS FOR CMS,  
12:22PM 2 AND WE THOUGHT THIS WAS AN APPROPRIATE INSTRUCTION TO INCLUDE.

12:22PM 3 I'LL ALSO NOTE THAT QUESTION 63 ON THE JUROR QUESTIONNAIRE  
12:22PM 4 TALKED ABOUT AND ASKED THE JURORS ABOUT THEIR VIEWS ON LAW  
12:22PM 5 ENFORCEMENT WITNESSES AND WHETHER THEY GIVE MORE CREDENCE TO  
12:23PM 6 LAW ENFORCEMENT WITNESSES, OR LESS CREDENCE.

12:23PM 7 SO I THINK IT IS AN APPROPRIATE INSTRUCTION UNDER THESE  
12:23PM 8 CIRCUMSTANCES.

12:23PM 9 THE COURT: OKAY.

12:23PM 10 MS. VOLKAR.

12:23PM 11 MS. VOLKAR: FIRST OF ALL, I WANT TO MAKE SURE THAT  
12:23PM 12 I RESPOND TO MS. WALSH'S POINT.

12:23PM 13 MS. BENNETT IS NOT A LAW ENFORCEMENT WITNESS. THE COURT  
12:23PM 14 HELD THAT SHE'S NOT A LAW ENFORCEMENT OFFICER WHEN IT COMES TO,  
12:23PM 15 FOR EXAMPLE, THE HEARSAY EXCEPTION FOR PUBLIC RECORDS. SO I  
12:23PM 16 THINK THAT'S A FALSE PREMISE.

12:23PM 17 BUT MORE IMPORTANTLY, I THINK THAT THE ENTIRE -- THE  
12:23PM 18 GOVERNMENT OBJECTS TO GIVING THIS INSTRUCTION IN THE ENTIRETY,  
12:23PM 19 IN LARGE PART BECAUSE IT'S REDUNDANT OF OTHER INSTRUCTIONS THAT  
12:23PM 20 THE COURT IS ALREADY GOING TO GIVE.

12:23PM 21 FIRST OF ALL, IT'S REDUNDANT OF THE CREDIBILITY  
12:23PM 22 INSTRUCTIONS, WHICH WAS NUMBER 9 IN ECF 1206, AND FOR THAT  
12:23PM 23 INSTRUCTION IT SAYS THE JURY CAN CONSIDER BIAS OR PREJUDICE OF  
12:23PM 24 A WITNESS.

12:24PM 25 AND, OF COURSE, THE DEFENSE IS ENTITLED TO ARGUE IN



12:24PM 1 CLOSING ARGUMENT THAT HER ROLE AS A GOVERNMENT EMPLOYEE BIASES  
12:24PM 2 OR PREJUDICES HER TESTIMONY IN SOME WAY.

12:24PM 3 ALSO, NUMBER 1, AND ALSO ONE OF THE 7 SERIES WE WERE JUST  
12:24PM 4 REFERENCING, BASED ON THE ADDITIONS IN THE HOLMES TRIAL, THERE  
12:24PM 5 IS AN ADDED LANGUAGE THAT THE JURY SHOULD NOT CONSIDER A  
12:24PM 6 PERSON'S PROFESSION IN ESSENTIALLY GIVING WEIGHT TO THEIR  
12:24PM 7 TESTIMONY OR WHEN CONSIDERING THEM -- I APOLOGIZE, I DON'T HAVE  
12:24PM 8 THE LANGUAGE IMMEDIATELY BEFORE ME -- BUT ADDED INTO THAT  
12:24PM 9 LANGUAGE WAS PROFESSION, POSITION IN THE COMMUNITY, AND THAT'S  
12:24PM 10 ANOTHER JURY INSTRUCTION THAT THE DEFENSE CAN POINT TO.

12:24PM 11 AND THIS INSTRUCTION UNNECESSARILY CALLS OUT A PIECE OF  
12:24PM 12 EVIDENCE OR A SPECIFIC PERSON'S TESTIMONY. IT ESSENTIALLY  
12:24PM 13 ELEVATES MS. BENNETT TO KIND OF LIKE THE ROLE OF AN EXPERT, AND  
12:25PM 14 WHY I SAY THAT IS BECAUSE THERE'S A SEPARATE INSTRUCTION ABOUT  
12:25PM 15 CREDIBILITY WHEN IT COMES TO EXPERTS, AND THERE'S A SEPARATE  
12:25PM 16 INSTRUCTION ABOUT DUAL ROLE TESTIMONY, AND TO HAVE AN  
12:25PM 17 INSTRUCTION LIKE THIS CALLS OUT AND ELEVATES ANOTHER TYPE OF  
12:25PM 18 TESTIMONY IN THAT VEIN AND GIVES, HONESTLY, MORE EMPHASIS TO  
12:25PM 19 IT.

12:25PM 20 THERE ARE NO -- IT'S -- SORRY. LET ME BACK UP.

12:25PM 21 ANOTHER POINT IS THAT GOVERNMENT AGENTS OR FEDERAL AGENTS  
12:25PM 22 TESTIFY IN CRIMINAL TRIALS ALL THE TIME, BUT THERE IS NO MODEL  
12:25PM 23 INSTRUCTION ON THIS POINT OTHER THAN UNDERCOVER AGENTS WAS WHAT  
12:25PM 24 I WAS ABLE TO FIND.

12:25PM 25 AND I POINT THAT OUT TO SAY, THIS IS SOMETHING THAT

12:25PM 1 HAPPENS ALL OF THE TIME, AND IF A SPECIAL INSTRUCTION WERE  
12:25PM 2 NEEDED, YOU WOULD HAVE -- ONE WOULD ASSUME THAT THE  
12:25PM 3 NINTH CIRCUIT WOULD HAVE PROMULGATED A MODEL INSTRUCTION FOR  
12:26PM 4 IT.

12:26PM 5 AND WHEN I LOOK AT THEIR LIST OF REFERENCES AND AUTHORITY  
12:26PM 6 FOR THIS, IT'S LARGELY OUT OF CIRCUIT OR MATTHEW BENDER OR  
12:26PM 7 VARIOUS OTHER SECONDARY SOURCES.

12:26PM 8 THE ONLY NINTH CIRCUIT CASE CITED IS THE LAST ONE, AND  
12:26PM 9 I'VE READ THAT CASE, YOUR HONOR, AND THAT COURT JUST APPROVED  
12:26PM 10 THE GIVING OF THE GENERIC CREDIBILITY INSTRUCTION WHICH AT THE  
12:26PM 11 TIME CONTAINED THE LANGUAGE THAT IS QUOTED.

12:26PM 12 SO I ACTUALLY THINK THE ONE NINTH CIRCUIT CASE CITED  
12:26PM 13 SUPPORTS THE GOVERNMENT'S POSITION THAT THE MODEL INSTRUCTION  
12:26PM 14 ON CREDIBILITY IS SUFFICIENT TO COVER THIS, AND PERHAPS WE NEED  
12:26PM 15 TO HAVE SOME TWEAKING TO ADD "OCCUPATION OR BACKGROUND" INTO  
12:26PM 16 THAT INSTRUCTION.

12:26PM 17 BUT I DON'T THINK A SECOND INSTRUCTION CALLING OUT ONE  
12:26PM 18 WITNESS IS NECESSARY IN THIS CASE.

12:26PM 19 MS. WALSH: SO, YOUR HONOR, LET ME ADDRESS AS MUCH  
12:27PM 20 AS I CAN OF THAT.

12:27PM 21 I THINK WHEN MS. VOLKAR WAS REFERRING TO MATTHEW BENDER,  
12:27PM 22 SHE WAS REFERRING TO JUDGE SANDS'S MODEL FEDERAL JURY  
12:27PM 23 INSTRUCTIONS WHICH ARE USED ALL OVER THE COUNTRY QUITE  
12:27PM 24 FREQUENTLY.

12:27PM 25 I UNDERSTAND THERE'S NOT A PATTERN INSTRUCTION IN THE

12:27PM 1 NINTH CIRCUIT FOR LAW ENFORCEMENT WITNESSES, EXCEPT IF THEY'RE  
12:27PM 2 UNDERCOVER.

12:27PM 3 AND AS TO MS. BENNETT, I DON'T THINK I SAID SHE WAS LAW  
12:27PM 4 ENFORCEMENT. I THINK I SAID SHE WORKED FOR CMS.

12:27PM 5 I WAS REFERRING TO THE JUROR QUESTIONNAIRE, WHICH -- IN  
12:27PM 6 WHICH THE COURT INCLUDED A QUESTION TO THE PANEL ABOUT WHETHER  
12:27PM 7 THEY GIVE MORE CREDENCE OR LESS CREDENCE TO LAW ENFORCEMENT  
12:27PM 8 WITNESSES.

12:27PM 9 SO I THINK THIS INSTRUCTION IS APPROPRIATE. I DON'T  
12:27PM 10 THINK -- I THINK THE COURT HAS THE DISCRETION TO INCLUDE THIS.

12:27PM 11 SINCE MS. BENNETT IS AN AGENT OF THE GOVERNMENT, SHE'S A  
12:27PM 12 REGULATOR, SOME JURORS MAY GIVE THAT MORE WEIGHT THAN NOT, AND  
12:28PM 13 IT'S APPROPRIATE TO INSTRUCT THEM THAT THEY SHOULDN'T, JUST  
12:28PM 14 BASED ON HER STATUS AS A REGULATOR, GIVE HER TESTIMONY MORE  
12:28PM 15 WEIGHT.

12:28PM 16 THE COURT: THANK YOU.

12:28PM 17 WELL, WHAT IF WE ADDED THAT LAST QUOTED SENTENCE IN YOUR  
12:28PM 18 PAGE 24, BOTTOM OF THE PAGE, "YOU'RE REQUIRED TO USE THE SAME  
12:28PM 19 STANDARD IN JUDGING THE CREDIBILITY OF EVERY WITNESS,  
12:28PM 20 REGARDLESS OF WHAT HIS OCCUPATION OR BACKGROUND MAY BE," "HIS  
12:28PM 21 OR HER OCCUPATION OR BACKGROUND MAY BE."

12:28PM 22 "OR" INSTEAD OF "YOUR."

12:28PM 23 "YOU SHOULD USE THE SAME STANDARD."

12:28PM 24 MS. WALSH: I, I -- JUDGE -- YOUR HONOR, I THINK  
12:29PM 25 THIS IS TOO GENERIC, AND I THINK THE JURY SHOULD BE INSTRUCTED

12:29PM 1 THAT SOMEONE WHO WORKS FOR A GOVERNMENT AGENCY, IN A CASE  
12:29PM 2 BROUGHT BY THE GOVERNMENT, SHOULD NOT GET MORE WEIGHT JUST FOR  
12:29PM 3 THE FACT THAT SHE WORKS FOR THE GOVERNMENT.

12:29PM 4 THE COURT: OKAY. WELL, IF YOU WOULD LIKE TO ADD  
12:29PM 5 THAT LAST SENTENCE, I'LL GIVE YOU THE OPPORTUNITY TO DO SO,  
12:29PM 6 INSTEAD OF GIVING YOU YOUR FULL INSTRUCTION, WHICH IS TO SAY  
12:29PM 7 I'M NOT GOING TO GIVE THE ONE THAT YOU'RE SUGGESTING. I WOULD  
12:29PM 8 GIVE THE LAST SENTENCE --

12:29PM 9 MS. WALSH: OKAY.

12:29PM 10 THE COURT: -- OR A MODIFICATION OF IT.

12:29PM 11 BUT IT'S GRAMMATICALLY MORE APPEALING.

12:29PM 12 AND THAT COULD BE INSERTED PERHAPS AS THE NEW NUMBER 8.

12:29PM 13 AND THEN THE CURRENT NUMBER 8, THIS IS ON THE CREDIBILITY  
12:29PM 14 INSTRUCTION, WOULD BE THE LAST -- NUMBER 9 THEN WOULD BE -- THE  
12:29PM 15 LAST BULLET WOULD BE, THE LAST NUMBER WOULD BE 9, "ANY OTHER  
12:29PM 16 FACTORS THAT BEAR ON BELIEVABILITY."

12:30PM 17 AND THEN THIS INSERT COULD BE THE NEW NUMBER 8.

12:30PM 18 DOES THAT MAKE SENSE? HAVE I CONFUSED YOU?

12:30PM 19 MS. VOLKAR: LET ME CLARIFY THAT LAST PART,  
12:30PM 20 YOUR HONOR.

12:30PM 21 THE COURT: SURE.

12:30PM 22 MS. VOLKAR: THIS WOULD BE GRAMMATICALLY CORRECT --

12:30PM 23 THE COURT: YES.

12:30PM 24 MS. VOLKAR: SORRY, NOW I'M CONFUSED.

12:30PM 25 THIS SENTENCE, MADE GRAMMATICALLY CORRECT, WOULD BE

12:30PM 1 INSERTED AS 8 AND BUMP DOWN WHAT IS CURRENTLY NUMBER 8?

12:30PM 2 THE COURT: THAT'S CORRECT. AND CURRENT NUMBER 8

12:30PM 3 WOULD BE NUMBER 9.

12:30PM 4 MS. VOLKAR: UNDERSTOOD.

12:30PM 5 THE COURT: THE LAST, NUMBER 9, WOULD BE "ANY OTHER

12:30PM 6 FACTORS THAT BEAR ON BELIEVABILITY."

12:30PM 7 MS. VOLKAR: THAT'S FINE WITH THE GOVERNMENT, YOUR

12:30PM 8 HONOR.

12:30PM 9 THE COURT: DID YOU GET THAT, MS. WALSH?

12:30PM 10 MS. WALSH: I DID, YOUR HONOR.

12:30PM 11 THE COURT: SO WITH THAT, I WON'T GIVE THE PROPOSED

12:30PM 12 GOVERNMENT AGENCY WITNESS INSTRUCTION. I WILL, HOWEVER, ALLOW

12:30PM 13 A GRAMMATICALLY CONFORMED LAST LINE TO APPEAR IN THE NUMERICAL

12:31PM 14 ITEMS TO CONSIDER, AND THE LAST ITEM THEN WOULD BE "ANY OTHER

12:31PM 15 FACTORS THAT BEAR ON BELIEVABILITY."

12:31PM 16 AM I CORRECT THAT WE'VE EXHAUSTED ALL OF THE CONVERSATIONS

12:31PM 17 THIS MORNING?

12:31PM 18 MS. WALSH: IF I COULD JUST CHECK WITH MY TEAM?

12:31PM 19 THE COURT: SURE. OF COURSE.

12:31PM 20 MS. VOLKAR: YOUR HONOR, I'D LIKE TO PASS THE MIKE

12:31PM 21 TO MR. SCHENK.

12:31PM 22 THE COURT: YES.

12:31PM 23 (DISCUSSION AMONGST DEFENSE COUNSEL OFF THE RECORD.)

12:31PM 24 MS. WALSH: YES, YOUR HONOR, NOTHING ELSE ON THE

12:31PM 25 JURY INSTRUCTIONS.

12:31PM 1 THE COURT: OKAY. THANK YOU.

12:31PM 2 MR. SCHENK.

12:31PM 3 MR. SCHENK: YOUR HONOR, JUST AN ISSUE ON  
12:31PM 4 SCHEDULING, IF THE COURT WOULD LIKE TO TALK ABOUT THAT TOPIC.

12:31PM 5 THE COURT SUGGESTED THAT IT WAS GOING TO DEFER RULING ON  
12:31PM 6 THE MISSING EVIDENCE INSTRUCTION. I WONDER IF WE COULD SET A  
12:31PM 7 TIME FOR THAT.

12:31PM 8 I UNDERSTAND THAT THE JURY IS HERE UNTIL 2:00 P.M.  
12:32PM 9 TOMORROW.

12:32PM 10 THE COURT: RIGHT.

12:32PM 11 MR. SCHENK: AND I THINK 2:00 P.M. TOMORROW,  
12:32PM 12 ASSUMING THE DEFENSE HAS FINISHED THEIR DIRECT OF THEIR EXPERT,  
12:32PM 13 IS AN APPROPRIATE TIME TO TAKE UP THIS INSTRUCTION, BECAUSE THE  
12:32PM 14 COURT'S THOUGHTS ON WHETHER IT MIGHT GIVE THAT INSTRUCTION  
12:32PM 15 BASED ON WHAT IT HEARD WILL BE USEFUL IN GUIDING THE  
12:32PM 16 GOVERNMENT'S DECISION AND ANALYSIS OF WHETHER IT WOULD PUT ON A  
12:32PM 17 REBUTTAL CASE.

12:32PM 18 SO IF THAT WILL WORK?

12:32PM 19 THE COURT: SURE.

12:32PM 20 MR. COOPERSMITH?

12:32PM 21 MR. COOPERSMITH: THAT SOUNDS FINE, YOUR HONOR.

12:32PM 22 THE COURT: LET ME TELL YOU, WE -- I HAVE TO  
12:32PM 23 DISAPPOINT YOU TO START AT 2:00 O'CLOCK, THOUGH. APPARENTLY I  
12:32PM 24 HAVE A CHANGE OF PLEA HEARING AT 2:00 O'CLOCK.

12:32PM 25 BUT WE'LL TAKE IT UP AS SOON AS I'M FINISHED WITH THAT,

12:32PM 1 WHICH WOULD PROBABLY BE 2:30, 2:45.

12:32PM 2 MR. COOPERSMITH: YES. WE CAN WAIT, OF COURSE,  
12:32PM 3 YOUR HONOR.

12:32PM 4 MR. SCHENK: YES, YOUR HONOR.

12:32PM 5 THE COURT: GREAT.

12:32PM 6 OKAY. MS. VOLKAR.

12:32PM 7 MS. VOLKAR: SORRY, YOUR HONOR. IN PACKING UP, WE  
12:32PM 8 DIDN'T DISCUSS THE VERDICT FORM.

12:32PM 9 THE COURT: NO, WE DIDN'T.

12:32PM 10 MS. VOLKAR: IS THAT ON PURPOSE?

12:32PM 11 THE COURT: IS THERE ANYTHING THAT WE NEED TO TALK  
12:33PM 12 ABOUT ON THE VERDICT FORM?

12:33PM 13 MS. VOLKAR: WHAT I STARTED OFF IN MY OPENING SORT  
12:33PM 14 OF REMARKS WAS THAT THE VERDICT FORM I FEEL IS THE SAME DEBATE  
12:33PM 15 AS BETWEEN MS. HOLMES AND THE GOVERNMENT.

12:33PM 16 THE GOVERNMENT THINKS THE COURT SHOULD DO WHAT IT DID LAST  
12:33PM 17 TIME AND WHAT IT DOES IN MOST CASES, AND THAT'S REALLY THE ONLY  
12:33PM 18 THING THAT I HAVE TO SAY THERE.

12:33PM 19 MS. WALSH: YES, YOUR HONOR.

12:33PM 20 I THINK THE ONLY REALLY SUBSTANTIVE CHANGE, I THINK, WAS  
12:33PM 21 THE ORDER OF THE NOT GUILTY, GUILTY.

12:33PM 22 THE COURT: RIGHT.

12:33PM 23 MS. WALSH: WE WOULD PREFER THAT SINCE MR. BALWANI  
12:33PM 24 IS PRESUMED INNOCENT.

12:33PM 25 BUT I UNDERSTAND IN THE HOLMES TRIAL THAT THE COURT

12:33PM 1 DECIDED NOT TO DO IT THAT WAY.

12:33PM 2 AND THE OTHER ITEMS WERE CAPITALIZING INDICTMENT AND  
12:33PM 3 INSERTING "AGAINST THERANOS PAYING PATIENTS" --

12:33PM 4 THE COURT: YES.

12:33PM 5 MS. WALSH: -- AND, AGAIN, "THERANOS INVESTORS"  
12:33PM 6 AFTER WIRE FRAUD, AND THEN TAKING OUT THE NAMES OF THE  
12:33PM 7 INVESTORS.

12:34PM 8 I BELIEVE THAT WAS IT.

12:34PM 9 THE COURT: MS. VOLKAR.

12:34PM 10 MS. VOLKAR: MY NOTES ARE NOT AS CAREFUL ON THIS. I  
12:34PM 11 APOLOGIZE.

12:34PM 12 BUT I ASSUME THAT'S CORRECT.

12:34PM 13 THE COURT: WELL, I'LL HAVE YOU -- IT WOULD BE MY  
12:34PM 14 INTENT TO OTHERWISE GIVE THE SAME VERDICT FORM, USE THE SAME  
12:34PM 15 VERDICT FORM, PARDON ME, THAT I USED IN THE HOLMES CASE.

12:34PM 16 BUT I'LL LET YOU LOOK AND SEE IF THERE'S ANY SIGNIFICANT  
12:34PM 17 OTHER CHANGES THAT YOU WANT TO DRAW TO MY ATTENTION. WE CAN  
12:34PM 18 TALK ABOUT THAT TOMORROW AFTERNOON AS WELL.

12:34PM 19 MS. WALSH: SURE.

12:34PM 20 MS. VOLKAR: THAT'S CORRECT. THAT'S VERY HELPFUL.

12:34PM 21 THE COURT: ALL RIGHT. THANK YOU.

12:34PM 22 THE CLERK: COURT IS ADJOURNED.

12:34PM 23 (COURT ADJOURNED AT 12:34 P.M.)

24

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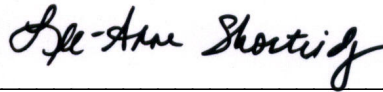
CERTIFICATE OF REPORTERS

WE, THE UNDERSIGNED OFFICIAL COURT REPORTERS OF THE  
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO  
HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS  
A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE  
ABOVE-ENTITLED MATTER.



IRENE RODRIGUEZ, CSR, CRR  
CERTIFICATE NUMBER 8076



LEE-ANNE SHORTRIDGE, CSR, CRR  
CERTIFICATE NUMBER 9595

DATED: JUNE 8, 2022